

# **TRANSCRIPT OF RECORD**

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## **Supreme Court of the United States**

**OCTOBER TERM, 1942**

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### **No. 623**

**OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,  
PETITIONER,**

**vs.**

**THE UNITED STATES OF AMERICA**

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### **No. 624**

**OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,  
PETITIONER,**

**vs.**

**THE UNITED STATES OF AMERICA**

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### **No. 625**

**OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,  
PETITIONER,**

**vs.**

**THE UNITED STATES OF AMERICA**

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**ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE TENTH CIRCUIT**

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**PETITION FOR CERTIORARI FILED JANUARY 5, 1943.**

**CERTIORARI GRANTED FEBRUARY 15, 1943.**

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

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## No. 623

OKLAHOMA TAX COMMISSION OF THE STATE OF  
OKLAHOMA, PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA

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## No. 624

OKLAHOMA TAX COMMISSION OF THE STATE OF  
OKLAHOMA, PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA

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## No. 625

OKLAHOMA TAX COMMISSION OF THE STATE OF  
OKLAHOMA, PETITIONER,

*vs.*

THE UNITED STATES OF AMERICA

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE TENTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 11, 1943.



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[fol. 1]

**IN THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE TENTH CIRCUIT**

**No. 2558**

**UNITED STATES OF AMERICA, Appellant,**

**vs.**

**OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,  
Appellee**

**STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO  
RELY ON APPEAL, AND DESIGNATION OF PARTS OF THE RECORD  
TO BE PRINTED—Filed May 15, 1942**

Comes now the above named appellant, United States of America, by William H. Landram, Assistant United States Attorney for the Eastern District of Oklahoma, and pursuant to Rule 13 of the Revised Rules of the United States Circuit Court of Appeals for the Tenth Circuit, states that the point on which appellant intends to rely on appeal in the above case is as follows:

1. No part of the restricted estate of a deceased allottee of the Five Civilized Tribes of Oklahoma is subject to the estate and inheritance tax laws of the State of Oklahoma.

**Designation of Parts of Record and Proceedings to Be  
Printed**

The Clerk will cause to be printed for the consideration of the court in deciding this case the following parts of the record:

1. Complaint and Exhibits of Plaintiff.
2. Answer of Defendant.
3. Stipulation and agreement filed July 15, 1941.
4. Order Admitting Certain Patents and Oil and Gas Leases into Evidence.

[fol. 2] 5. Findings of Fact and Conclusions of Law.

6. Judgment.

7. Notice of Appeal.

8. Order Extending the Time for Filing the Record on Appeal and Docketing the Action.

9. Statement of Points on which the United States of America Intends to Rely on Appeal.

10. Stipulation Designating Parts of the Record, Proceedings and Evidence to be Included in the Record on Appeal.

11. This Statement of Points on which Appellant Relies and Designation of Parts of the Record to be Printed.

United States of America, By William H. Landram,  
Assistant United States Attorney, Attorney for  
Appellant.

State of Oklahoma,  
County of Muskogee, ss:

**Affidavit of Mailing**

WILLIAM H. LANDRAM, of lawful age, being first duly sworn upon his oath, deposes and states:

That on the 13th day of May, 1942, he enclosed a copy of the above and foregoing statement of points on which appellant intends to rely on appeal, and designation of parts of the record and proceedings to be printed, in an envelope addressed to A. Francis Porta, Attorney, Oklahoma Tax Commission, State Capitol Building, Oklahoma City, Oklahoma; said envelope was securely sealed and being United States Government mail required no postage; said affiant deposited said envelope in the United States Post Office at Muskogee, Oklahoma, on the date aforesaid.

William H. Landram.

Subscribed and sworn to before me this 13th day of May, 1942. Chas. T. Diffendaffer, Notary Public.  
(Seal.) My commission expires 11-7-1945.

[File endorsement omitted]

[fol. 3] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER CONSOLIDATING CAUSES FOR PURPOSES OF PRINTING,  
ETC.—May 18, 1942

These causes came on to be heard on the motion of appellant to consolidate the cases in one printed transcript of record for hearing and to consolidate the cases for briefing, and were submitted to the court.

On consideration whereof, it is now here ordered by the court that the said motion be and the same is hereby granted.

[caption omitted]

[fol. 4] IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF OKLAHOMA

Civil Action. No. 432

UNITED STATES OF AMERICA, Plaintiff,

vs.

OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,  
Defendant

COMPLAINT—Filed Jan. 9, 1941

Comes now the plaintiff, United States of America, by Cleon A. Summers, United States Attorney for the Eastern District of Oklahoma, and William H. Landram, Assistant United States Attorney, by authority of the Attorney General of the United States, and at the request of the Secretary of the Interior, in its own behalf and for and on behalf of the Estate of Lucy, afterwards Lucy Bemore, deceased full-blood Seminole Indian, enrolled as such opposite Roll No. 1563, and for cause of action against the defendant alleges and states:

# I

That the defendant, Oklahoma Tax Commission, was created by the laws of the State of Oklahoma and given the power and authority to make assessments and collections, among other things, of estate and inheritance taxes levied and assessed against estates of deceased persons within the State of Oklahoma;

## II

That Lucy, afterwards Lucy Bemore, full-blood restricted Indian, enrolled as such opposite Roll No. 1563, departed this life on or about December 23, 1932, while a resident in good faith of the State of Oklahoma; that according to law the real and personal property belonging to the said Lucy, afterwards Lucy Bemore, now deceased, was restricted [fol. 5] from alienation, encumbrance and taxation; that said property was under the control and supervision of the Superintendent for the Five Civilized Tribes, the Secretary of the Interior, and the Plaintiff herein; that the said Lucy, afterwards Lucy Bemore, now deceased, was at all times during her lifetime a ward of the plaintiff herein;

## III

That the defendant herein assessed the estate of Lucy, afterwards Lucy Bemore, a deceased restricted member of the Five Civilized Tribes, as estate and inheritance taxes, the sum of Five Thousand Nine Hundred Twenty-five and 20/100 Dollars (\$5,925.20); that the Secretary of the Interior and plaintiff herein on the 10th day of December, 1940, paid to the defendant herein, under protest, the amount of the assessment of said taxes in the sum of Five Thousand Nine Hundred Twenty-five and 20/100 Dollars (\$5,925.20); a photostatic copy of an official receipt of payment of said taxes to said defendant is hereto attached, marked Exhibit "A," incorporated herein and made a part hereof;

## IV

Plaintiff further alleges and states that all property belonging to the estate of Lucy, afterwards Lucy Bemore, a deceased restricted member of the Five Civilized Tribes, is restricted and subject to and under the control and supervision of the Secretary of the Interior and the plaintiff by acts of Congress and laws of the United States;

## V

Plaintiff further alleges and states that the defendant had no right, authority or power, either at law or in equity, to assess the estate of Lucy, afterwards Lucy Bemore, a deceased restricted member of the Five Civilized Tribes, for inheritance and estate taxes, as same is an assessment

against the plaintiff herein and contrary to law; that the said plaintiff is entitled to recover the amount of the assessment paid to the defendant by the plaintiff herein;

## VI

That there was allotted and patented to Lucy, afterwards [fol. 6] Lucy Bemore, as her homestead allotment the non-taxable and restricted lands described as follows:

Lot Six (6) of Section Eighteen (18), Township Five (5) North and Range Eight (8) East, Seminole County, Oklahoma;

A certified photostatic copy of the homestead allotment deed is attached hereto, marked Exhibit "B" and made a part hereof;

## VII

That there was allotted and patented to Lucy afterwards Lucy Bemore, as her surplus allotment the non-taxable and restricted land described as follows:

Lot Five (5) of Section Eighteen (18), and the North Sixteen and 26/100 (16.26) acres of Lot One (1) of Section Nineteen (19), Township Five (5) North and Range Eight (8) East, Seminole County, Oklahoma;

A certified photostatic copy of the surplus allotment deed is attached hereto, marked Exhibit "C" and made a part hereof.

## VIII

That a certificate designating 68.04 acres of the above described lands as tax exempt was filed for record in the office of the County Clerk of Seminole County, Oklahoma, on May 23, 1930;

A certified photostatic copy of said certificate is attached hereto, marked Exhibit "D" and made a part hereof;

## IX

Plaintiff further alleges and states that at the time of making said payment of taxes to the Tax Commission it gave notice to said Tax Commission of its intention to file suit for recovery of said taxes; said notice so given is attached hereto, marked Exhibit "E," incorporated herein and made a part hereof;



Wherefore, Plaintiff demands judgment against the defendant in the sum of Five Thousand Nine Hundred Twenty-five and 20/100 Dollars (\$5,925.20), plus interest at the rate of 3% per annum from the date of payment by [fols. 7-8] said Secretary of the Interior and plaintiff herein until paid; plaintiff further demands that the said defendant be permanently enjoined and restrained from assessing or collecting estate or inheritance taxes from the estate of a deceased member of the Five Civilized Tribes, and more particularly the estate of Lucy, afterwards Lucy Bemore, full-blood restricted Seminole Indian, now deceased, and such temporary and permanent relief as plaintiff may show itself entitled, and for its costs herein expended.

Cleon A. Summers, United States Attorney. William  
H. Landram, Assistant United States Attorney.

[File endorsement omitted.]



[fol. 9-10]  
OTC Form C-102

EXHIBIT A TO COMPLAINT

State of Oklahoma  
Oklahoma Tax Commission  
Oklahoma City, Oklahoma

The report or return hereby acknowledged, as stated below, is accepted subject to final audited tax liability.

The accompanying remittance is subject to final audit and solvent credits. Penalties, as provided by law, will attach the same as if no remittance had been made, when, for any reason checks, drafts or other exchange are returned unpaid.

Total Tax Payable	Amount of Remittance	Unpaid Balance
	5,925.20	Date Dec 10 40

Official Receipt of  
Report, Or Return and  
Remittance As Shown

Key Letter Shows Kind of Tax Paid

A—Motor Fuel	L—Fuels Excise
B—Corporation License	M—Sales Tax
C—Gross Production	N—Cigarette
D—Inheritance Tax	P—Proration Fund
E—Income Tax	Q—Beverage
F—Mileage Tax	R—Freight Car Tax
G—Use Tax	T—Alcohol Permit
H—Special Fuel Use	U—Used Equipment
K—Miscellaneous Tax	V—Tokens

Name of Taxpayer	City or Town	State
Street, R. F. D. or Box		
Lucy Bemore, Dec'd, Full Blood		
Seminole # 1563—USA—Five Tribes Agency		
Muskogee	Oklahoma	
		1,519 D

G. H. Stromms, Cashier.

[fol. 11]

## EXHIBIT B TO COMPLAINT

Homestead Allotment Deed No. 1522

MC

Seminole Roll No. 1563

To the Seminole Nation,

State of Oklahoma

To all to whom these Presents shall come, Greeting:

Whereas, By an agreement between the United States and the Seminole Nation, ratified by the Council of the Seminole Nation on December 24, 1897, and by act of Congress approved July 1, 1898 (30 Stat. L., 567), it was provided that all lands belonging to the Seminole Tribe of Indians shall be allotted among the members of said tribe, and

Whereas, It was provided by said act of Congress that "each allottee shall designate one tract of forty acres, which shall by the terms of the deed be made inalienable and nontaxable as a homestead in perpetuity," and

Whereas, It was provided by the act of Congress approved March 3, 1903 (32 Stat. L., 1008), that for the homestead referred to in the aforesaid act of Congress a separate deed shall issue, and

Whereas, The Commissioner to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of Lucy as a Homestead allotment, and that the said allottee has been duly enrolled with the approval of the Secretary of the Interior as a full blood citizen of said tribe opposite No. 1563 on the approved roll;

Now, therefore, I, the undersigned, the Principal Chief of the Seminole Nation, by virtue of the power and authority vested in me by law, have granted and conveyed, and by these presents do grant and convey unto the said Lucy all right, title, and interest of the Seminole Nation and of all other members of said Nation, in and to the following described lands, viz: Lot Six (6) of Section Eighteen (18), Township Five (5) North and Range Eight (8) East of the Indian Base and Meridian, in the State of Oklahoma, containing 39.97 acres more or less, according to the United States survey thereof, which shall be inalienable and nontaxable as a homestead in perpetuity, subject, how-

ever, to all acts of Congress pertaining to or in any way affecting the Leasing, Incumbrance, or Alienation of said land.

In Witness Whereof, I, the Principal Chief of the Seminole Nation, have hereunto set my hand and caused the great seal of said Nation to be affixed this 27th day of March, A. D. 1913.

John F. Brown, Principal Chief of the Seminole Nation. (Seal.)

Department of the Interior

Approved: May 6—1913.

Franklin K. Lane, Secretary, by G. F. Farrell, Clerk.

Record 15 day of May 1913, at 1 o'clock P. M.  
(Seal.)

Department of the Interior

Office of the Superintendent for the Five Civilized Tribes  
Muskogee, Oklahoma

This is to certify that I am the officer having custody of the records of deeds of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Nations, and the above and foregoing is a true and correct copy of the deed issued to Lucy as the name appears of record in Book No. 5A page 424 of Seminole Homestead Deed *Deed* Records.

May 6, 1942.

J. T. Wilkinson, Asst. to Superintendent. (Seal.)

[fol. 13]

EXHIBIT C TO COMPLAINT

Surplus Allotment Deed No. 1522

MC

Seminole Roll No. 1563

The Seminole Nation,  
State of Oklahoma

To all to whom these Presents shall come, Greeting:

Whereas, By an agreement between the United States and the Seminole Nation, ratified by the Council of the Seminole Nation on December 24, 1897, and by act of Con-

gress approved July 1, 1898 (30 Stat. L., 567), it was provided that all lands belonging to the Seminole Tribe of Indians shall be allotted among the members of said tribe, and

Whereas, It was provided by the act of Congress approved March 3, 1903 (32 Stat. L., 1008), that for the homestead referred to in the aforesaid act of Congress a separate deed shall issue, and

Whereas, The Commissioner to the Five Civilized Tribes has certified that the land hereinafter described had been selected by or on behalf of Lucy as a Surplus allotment and that the said allottee has been duly enrolled with the approval of the Secretary of the Interior as a full blood citizen of said tribe opposite No. 1563 on the approved roll;

Now, therefore, I, the undersigned, the Principal Chief of the Seminole Nation, by virtue of the power and authority vested in me by law, have granted and conveyed, and by these presents do grant and convey unto the said Lucy all right, title, and interest of the Seminole Nation and of all other members of said Nation, in and to the following-described lands, viz: Lot Five (5) of Section Eighteen (18), and the North Sixteen and 26/100 (16.26) Acres of Lot One (1) of Section Nineteen (19), Township Five (5) [fol. 14] North and Range Eight (8) East of the Indian Base and Meridian, in the State of Oklahoma, containing 28.07 acres, more or less, according to the United States survey thereof, subject to all acts of Congress pertaining to or in any way affecting the Leasing, Incumbrance, or Alienation of said land.

In witness whereof, I, the Principal Chief of the Seminole Nation, have hereunto set my hand and caused the great seal of said nation to be affixed this 27th day of March A. D. 1913.

John F. Brown, Principal Chief of the Seminole Nation. (Seal.)

Department of the Interior

Approved: May 6—1913

Franklin K. Lane, Secretary, by G. F. Farrell, Clerk.

Record 15 day of May 1913, at 1 o'clock P M  
(Seal)

Department of the Interior  
Office of the  
Superintendent for the Five Civilized Tribes  
Muskogee, Oklahoma

This is to certify that I am the officer having custody of the records of deeds of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Nations, and the above and foregoing is a true and correct copy of the deed issued to Lucy as the name appears of record in Book No. 5A page 424 of Seminole Surplus Allotment Deed Records.

May 8, 1942.

J. T. Wilkinson, Asst. to Superintendent. (Seal.)

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[fol. 15]            EXHIBIT D TO COMPLAINT

Certificate 477

Designating Lands Exempt From Taxation

Five Civilized Tribes

Book 420, on Page 491

† #6173

Muskogee, Okla., October 11th, 1929.

Pursuant to Section 4 of the Act of Congress of May 10, 1928, (Public No. 360 - 70th Congress), the following described restricted Indian lands belonging to Lucy, Konowa, Okla., a full blood citizen of the Seminole Nation, Roll No. 1563, are hereby selected and designated as tax exempt as long as the title thereto remains in the said Lucy, or in any full-blood Indian heir or devisee of said lands; such tax

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† Figures in italic in handwriting on photostatic copy.

exemption, in no event, however, to extend beyond April 26, 1956:

Subdivision	Sec.	Twp.	Range	Area	County
Lots 5 & 6	18	5N	8E✓	51.78	Seminole
N 16.26 ac. Lot. 1	19	5N	8E✓	16.26	Seminole

†68.04

\* Lucy. (The Right  
Thumb Mark.)

Witness to Mark:

B. F. Wiley

Glenn Kivett.

Department of the Interior

Washington, D. C.

Approved:

Jos. M. Dixon,

First Assistant Secretary.

WAM—

May 12, 1930.

[fol. 16]

6173

Dept. of Int. to Lucy

Indexed

10-11-29

State of Oklahoma, Seminole County, ss.

I hereby certify that this instrument was filed for record in my office the 23 day of May, A. D. 1930, 3 o'clock P. M., and is duly recorded Record 420, Page 491.

Ellis Cooper, County Clerk, by Thelma Sesan.

Filed for record on the 3 day of August, 1931, at 9 o'clock A. M., and recorded in Book 25, Page 477.

A. M. Landman, Supt. for the Five Civilized Tribes,  
by Gertrude Hooton, Clerk.

\* To be signed by the Indian, or by the Superintendent if the Indian is a minor, incompetent adult, or where the Indian fails to designate.

Department of the Interior  
Office of  
Superintendent for the Five Civilized Tribes  
Muskogee, Oklahoma

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of Tax Exemption Certificate No. 477, issued to Lucy, Seminole Roll No. 1563.

May 8, 1942.

J. T. Wilkinson, Asst. to Superintendent.

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[fol. 17]                      EXHIBIT E TO COMPLAINT

I. L. & M. Division  
EBS:JBE—12-9-40

Encloses check in payment, under protest, of estate or inheritance taxes—

Estate of Lucy, deceased,  
Seminole No. 1563.

December 9, 1940.

Oklahoma Tax Commission, Oklahoma City, Oklahoma.

GENTLEMEN:

I am enclosing herewith check on the Treasurer of the United States in the sum of \$5,925.20, payable to your order, against the restricted account of Lucy, deceased, restricted Seminole Indian No. 1563, and/or her heirs or devisees, in satisfaction of the claim of the State of Oklahoma for estate or inheritance taxes against this estate.

This agency, acting under instructions from the Secretary of the Interior, is making payment of this tax under protest as the Department of the Interior refuses to recognize the right of the State of Oklahoma to assess and collect such a tax against the estate of any deceased restricted Indian or his heirs or devisees.



This will also advise you that the United States Attorney for the Eastern District of Oklahoma, under the instructions by the Attorney General issued upon the request of the Secretary of the Interior, has instituted suit against the Oklahoma Tax Commission to recover the funds paid to you as estate or inheritance taxes in the estate of Nitey, deceased, restricted Seminole Indian No. 1446. Within a few days a suit will also be instituted in the Wosey Deere case.

This will advise you that the United States Attorney for the Eastern District of Oklahoma filed suit against the Oklahoma Tax Commission on December 6, 1940, seeking the recovery of the funds paid as estate or inheritance taxes covering the estate of Nitey, deceased, Seminole No. 1446. The case is styled as follows: United States of America vs. Oklahoma Tax Commission, Civil No. 417.

In view of the pendency of the action to test the rights of the State of Oklahoma to assess and collect an estate or [fol. 18] inheritance tax against the estate of a restricted Indian or his heirs or devisees, notice is hereby given you under Paragraph 4, of Section 27, Chapter 66 of Article 2, or the State Tax Uniform Procedure Act, House Bill No. 243, Session Laws of Oklahoma 1939, that the tax hereby paid is under protest; and that we will be bound by the decision in the Nitey and Wosey John Deere cases; and that should the decision be adverse to the Tax Commission, the tax so paid will be refunded to the Superintendent for the Five Civilized Tribes Agency.

Respectfully, J. T. Wilkinson, Asst. to Superintendent.

Receipt of Government check in full payment of the taxes claimed by the State of Oklahoma against the estate of Lucy, deceased, Seminole No. 1563, is hereby acknowledged. The Oklahoma Tax Commission hereby acknowledges notice of this payment as being under protest, under Paragraph 4 of Section 27 of Chapter 66, Article 2 of the Oklahoma Session Laws of 1939:

Dec. 10, 1940.

Oklahoma Tax Commission, by J. D. Dunn, Vice-Chairman.



## IN UNITED STATES DISTRICT COURT

ANSWER AND CERTIFICATE OF SERVICE—Filed March 8, 1941

Comes now the defendant, Oklahoma Tax Commission, and, for its answer to the complaint filed herein, denies each and every material allegation therein contained, except as hereinafter specifically admitted, and demands strict proof thereof.

## I

Defendant admits the allegations contained in paragraphs numbered I, VI, VII and IX of the complaint.

## II

Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs numbered IV and VIII of the complaint.

[fol. 19]

## III

Defendant admits that Lucy, afterwards Lucy Bemore, was a full-blood Seminole Indian, enrolled as such opposite Seminole Roll No. 1563, and that she departed this life on or about December 23, 1932, while domiciled and a resident in good faith of the State of Oklahoma; defendant alleges that as to the remaining allegations of paragraph numbered II of the complaint, it is without knowledge or information sufficient to form a belief as to the truth thereof.

## IV

Defendant alleges that Lucy, afterwards Lucy Bemore, was the owner, at the time of her death, of an estate of the gross value of \$264,212.18; that said estate has been valued by the defendant for inheritance tax purposes at the net value of \$250,630.77, as of the date of the death of Lucy, afterwards Lucy Bemore; that said estate, upon the death of the said Lucy, afterwards Lucy Bemore (December 23, 1932) passed and was transferred to her surviving husband and son in equal shares under and pursuant to the intestate laws (laws of Descent and Distribution) of the State of Oklahoma; that the defendant, pursuant to the Inheritance Tax Law of the State of Oklahoma in force and effect at the time of the death of the said Lucy, afterwards Lucy Bemore, assessed inheritance tax on the transfer of

each of said shares, aggregating the total sum of \$5,925.20; that each of said transfers was subject to the tax assessed; defendant alleges that said tax was paid to it by the Secretary of the Interior on the 10th day of December, 1940, under protest; defendant admits issuance of "Exhibit-A" attached to the complaint; defendant denies that it assessed the estate of Lucy, afterwards Lucy Bemore, an estate and inheritance tax in the amount of \$5,925.20, or in any other amount, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that Lucy, afterwards Lucy Bemore, was, at the time of her death, a restricted member of the Five Civilized Tribes.

## V

Defendant denies each and every allegation contained in paragraph numbered V of the complaint; alleges that upon [fol. 20] the death of Lucy, afterwards Lucy Bemore, her said estate passed, as hereinabove stated, to her surviving husband and son in equal shares; that the transfer of each of said shares was under and pursuant to the intestate laws (Laws of Descent and Distribution) of the State of Oklahoma, and subject to the Oklahoma inheritance tax; that said estate was subject to valuation for inheritance tax purposes under the laws of the State of Oklahoma; that the defendant, pursuant to its duty and authority under the laws of said State, determined as aforesaid, the net value of said estate and fixed the same at \$250,630.77, and assessed and collected Oklahoma inheritance tax upon the transfer of the several shares of said estate in the aggregate sum of \$5,925.20.

Wherefore, Defendant, having fully answered the complaint filed herein, demands judgment under which plaintiff shall be denied the relief sought, and under which plaintiff's action shall be dismissed, and for all of its costs in and about this matter laid out and expended.

F. M. Dudley, Attorney for Defendant.

Address: State Capitol Building,  
Oklahoma City, Oklahoma.

STATE OF OKLAHOMA,  
County of Oklahoma, ss:

F. M. DUDLEY, of lawful age, being first duly sworn, states that he is the attorney for the Oklahoma Tax Commission,

defendant in the above numbered and styled cause; that on February 27, 1941, he served a true and correct copy of the above and foregoing answer on the plaintiff by depositing, on said date, in the United States Post Office, Capitol Station, Oklahoma City, Oklahoma, a copy of said answer, in a sealed envelope addressed to Mr. Wm. H. Landram, Assistant United States Attorney, Federal Building, Muskogee, Oklahoma, attorney for said plaintiff, with postage thereon fully prepaid.

F. M. Dudley.

Subscribed and sworn to before me this 27 day of February, 1941. R. R. Burnham, Notary Public.  
(Seal.) My commission expires: Dec. 28, 1941.

[fol. 21] [File endorsement omitted.]

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IN UNITED STATES DISTRICT COURT

STIPULATION AND AGREEMENT—Filed July 15, 1941

Comes now the plaintiff, United States of America, by William H. Landram, Assistant United States Attorney and attorney for the plaintiff, and the defendant, Oklahoma Tax Commission of the State of Oklahoma, by F. M. Dudley, attorney for the defendant, and stipulate and agree as follows:

1

That the defendant, Oklahoma Tax Commission, was created by the laws of the State of Oklahoma and, beside other things, was given the power and charged with the duty of assessing and collecting inheritance tax laid under the laws of the State of Oklahoma.

2

That Lucy, afterwards Lucy Bemore, was a full-blood Seminole Indian, enrolled as such opposite Roll No. 1563, and that she departed this life on or about December 23, 1932, while domiciled in and a resident in good faith of the State of Oklahoma; and that said decedent was at the time of her death, and had been at all times since November 16, 1907, a resident in good faith of and domiciled in the State

of Oklahoma; that the said decedent left surviving her Thomas (Thomas Coon), full-blood Seminole, not enrolled, a son, and Lewis Bemore,  $\frac{1}{4}$  blood Creek Indian, her husband.

## 3

That there was allotted and patented to Lucy, afterwards Lucy Bemore, as her homestead allotment, the following described lands:

Lot 6 of Section 18, Township 5 North, Range 8 East, Seminole County, Oklahoma;

and there was allotted and patented to Lucy, afterwards Lucy Bemore, as her surplus allotment, the following described lands:

[fol. 22] Lot 5 of Section 18, and the North 16.26 Acres of Lot 1 of Section 19, Township 5 North, Range 8 East, containing 28.07 acres;

That Lucy Bemore was the owner of the above described lands at the time of her death.

## 4

That there was purchased for and in behalf of Lucy Bemore, by the Secretary of the Interior, the following described lands, to-wit:

South 3 acres of the Northwest Quarter of the Southwest Quarter and the Southwest Quarter of the Southwest Quarter of Section 15, Township 5 North, Range 6 East, Pontotoc County, Oklahoma;

title being taken thereto in the name of Lucy Bemore on restricted form of deed; that said decedent was the owner of the lands described in this paragraph at the date of her death.

## 5

That the lands described in Paragraph 3 were leased during the lifetime of Lucy Bemore for oil and gas mining purposes under departmental oil and gas mining lease or leases approved by the Secretary of the Interior for a period of ten years or as long thereafter as oil and gas is produced in paying quantities. Production was had under said lease or leases from the lands described in Paragraph

3 beginning in 1920 and during the lifetime of said decedent, Lucy Bemore, and the Secretary of the Interior received under the provisions of said lease or leases, from 1920 to date of decedent's death, the royalty payments or income belonging to said decedent on account thereof; that all such royalty payments received by the Secretary of the Interior were deposited by said Secretary, along with all other funds currently received by him on behalf of all restricted Indians, in banks to his own account and said Secretary gave Lucy Bemore credit therefor on the books of the Interior Department.

That at the time of Lucy Bemore's death she had a cash credit on the books of the Interior Department created as aforesaid in the amount of \$205,008.14.

[fol. 23]

6

That Lucy Bemore was the owner at the time of her death of an estate of a gross value of \$264,212.18 consisting of the following:

Lots 5 and 6, Section 18, Township 5 North, Range 8 East; and North Sixteen and 26/100 (16.26) Acres of Lot 1, Section 19, Township 5 North, Range 8 East, Seminole County, Oklahoma	\$10,000.00
South 3 acres of Northwest Quarter of Southwest Quarter; and the Southwest Quarter of the Southwest Quarter, Section 15, Township 5 North, Range 6 East, Pontotoc County, Oklahoma, Purchased land	3,000.00
Oil and Gas and Mineral Lease, etc., Lots 5 and 6, Section 18, Township 5 North, Range 8 East; and North Sixteen and 26/100 (16.26) acres of Lot 1, Section 19, Township 5 North, Range 8 East, Seminole County, Oklahoma	\$46,204.04
Cash Credit mentioned under paragraph 5 above	\$205,008.14
	<hr/>
	\$264,212.18

7

That Lucy Bemore died intestate and her said estate aforesaid was transferred and passed to her above mentioned husband and son in equal shares.

That Lucy Bemore's said gross estate of the value of \$264,212.18 was value by the defendant, Oklahoma Tax Commission, for Oklahoma Inheritance Tax purposes at the net value of \$250,630.77 as of the date of said decedent's death; that said defendant, acting pursuant to the Oklahoma Inheritance Tax law in force at the time of Lucy Bemore's death assessed inheritance taxes in the aggregate of \$5,925.20.

That the Secretary of the Interior on the 10<sup>th</sup> day of December, 1940, paid to the defendant, Oklahoma Tax Commission, under protest, said sum and received therefor an [fol. 24] official receipt of payment, which receipt is attached to the complaint, marked "Exhibit A," incorporated therein and made a part thereof.

## 8

That all of the funds above mentioned belonging to the decedent at the time of her death were then retained and supervised by the Secretary of the Interior and since her death one-half of the above mentioned \$205,008.14 cash credit has been retained and supervised by the Secretary of the Interior in behalf of the surviving son of said decedent, the other one-half of said credit having been at the time, or shortly subsequent thereto, of decedent's death released to her surviving husband.

## 9

That "Exhibit D," attached to and made a part of the complaint, was filed of record in the office of the County Clerk of Seminole County on May 23, 1930, and recorded.

## 10

That if the transfer of Lucy Bemore's estate and the several shares thereof be subject to the Oklahoma inheritance tax in force and effect at the time of her death it is agreed that the net value of her said estate was \$250,630.77 as of that date and that the inheritance tax of \$5,925.20 assessed on the transfer of the shares thereof was and is the correct amount of tax. Should it be ultimately determined by the court that only a part of the estate of the decedent was subject to the Oklahoma inheritance tax then and in that event the tax will have to be recomputed.



## 11

That the tax so paid by the Secretary of the Interior to the defendant, Oklahoma Tax Commission, was paid under protest and at the time of making said payment said Secretary gave notice in writing to the defendant of his intention to file suit for the recovery of said tax.

## 12

That the credits hereinabove mentioned were carried on the books of the Interior Department kept by the Superintendent for the Five Civilized Tribes at Muskogee, Oklahoma.

## 13

Whether or not the lands, or any part thereof, described in this stipulation were restricted at the time of or subsequent to the death of the decedent is a question of law upon which the parties are not agreed; however, it is agreed that the Secretary of the Interior never at any time issued any instrument removing restrictions on said lands or any part thereof.

It is further agreed that either party may introduce in evidence certified copies of the patents under which said lands were originally patented.

It Is Further Stipulated and Agreed by and between the parties hereto that each party reserves the right to introduce further testimony and evidence in support of its pleadings, which is not inconsistent with the facts herein stipulated.

Dated this 15th day of July, 1941.

United States of America, Plaintiff; William H. Landram, Assistant United States Attorney, Attorney for Plaintiff; Oklahoma Tax Commission, Defendant, F. M. Dudley, Attorney for Defendant.

[File endorsement omitted.]

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IN UNITED STATES DISTRICT COURT

ORDER ADMITTING CERTAIN PATENTS AND OIL AND GAS LEASE  
INTO EVIDENCE—Filed October 11, 1941

Now on this 11th day of October, 1941, the United States of America, plaintiff herein, appeared by William H.

Landram, Assistant United States Attorney for the Eastern District of Oklahoma, and reported to the court that in Part 14 of the Stipulation and Agreement filed herein by the plaintiff and the defendant, it was agreed that either party might introduce into evidence certified copies of the patents under which the lands involved herein were originally patented. The said plaintiff offers the hereinafter named certified copies of patents, certificate designating lands exempt from taxation, and oil and gas mining lease as evidence in this case.

The court finds that in accordance with the stipulation and agreement signed by the plaintiff and defendant, said certified copies of the patents should be admitted into evidence in this case.

It Is Therefore Ordered, Adjudged and Decreed by the court that the following certified copies of patents and certificate designating lands exempt from taxation be admitted into evidence:

Certificate designating lands exempt from taxation—Exhibit "A";

Homestead Deed Patent of Lucy Bemore—Exhibit "B";

Surplus Allotment Deed of Lucy Bemore—Exhibit "C";

It is further ordered, adjudged and decreed that a certified copy of the Oil and Gas Mining Lease, dated the 5th day of January, 1920, signed by Lucy be introduced into evidence and marked Exhibit "D".

Eugene Rice, Judge.

O.K. F. M. Dudley, Attorney for Defendant.

O.K. William H. Landram, Attorney for Defendant.

Exhibit A, B and C are omitted for the reason that they appear at pages 15, 11 and 13 respectively.

[fol. 27]

#### EXHIBIT D

Oil and Gas Mining Lease Upon Land Selected for Allotment  
127 ind 6673

Seminole Nation, Oklahoma

Royalty No. 61913

This Indenture of Lease, Made and entered into quadruplicate on this 5th day of January A. D. 1920, by and be-



tween Lucy of Vamoosa, Oklahoma, enrolled as a Full blood citizen of the Seminole Nation, Roll No. 1563, party of the first part hereinafter designated as lessor, and M. F. Graham of Okmulgee, Oklahoma, party of the second part, hereinafter designated as lessee, under and in pursuance of the provisions of the Act of Congress approved May 27, 1908, (35 Stat. L. P. 313) Witnesseth:

1. The lessor, for and in consideration of one dollar, the receipt whereof is acknowledged, and of the royalties, covenants, stipulations and conditions hereinafter contained, and hereby agreed to be paid, observed and performed by the lessee, does hereby demise, grant, lease and let unto the lessee, for the term of ten years from the date of the approval hereof by the Secretary of the Interior, and as much longer thereafter as oil or gas is found in paying quantities, all the oil deposits and natural gas in or under the following described tract of land, lying and being within the county of Seminole and State of Oklahoma, to-wit: The Lot 5; Lot 6; of Section 18 and N. 16.26 acres of Lot 1, of of Section 19, Township 5 N., Range 8 E. of the Indian Meridian, and containing 68.04 acres, more or less, with the exclusive right to prospect for, extract, pipe, store and remove oil and natural gas, and to occupy and use so much, only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing, and removing such oil and natural gas, also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise, a sufficient supply of [fol. 28] water on said operations, and also the right to use, free of cost, oil and natural gas as fuel so far as necessary to the development and operation of said property.

2. The lessee hereby agrees to pay or cause to be paid to the Superintendent of the Five Civilized Tribes, Muskogee, Oklahoma, for the lessor, as royalty, the sum of 12½ per cent. of the gross proceeds of all crude oil extracted from the said land, such payments to be made at the time of sale or removal of the oil. And the lessee shall pay as royalty on each gas producing well three hundred dollars per annum in advance, to be calculated from the date of commencement of utilization: Provided, however, in the case of gas wells of small volume, when the rock pressure is one hundred pounds or less, the parties hereto may, subject to the approval of the Secretary of the Interior, agree

upon a royalty, which will become effective as a part of this lease; Provided further, That in case of gas wells of small volume, or where the wells produce both oil and gas or oil and gas and salt water to such extent that the gas is unfit for ordinary domestic purposes, or where the gas from any well is desired for temporary use in connection with drilling and pumping operations on adjacent or nearby tracts, the lessee shall have the option of paying royalties upon such gas wells of the same percentage of the gross proceeds from the sale of gas from such wells as is paid under this lease for royalty on oil. The lessor shall have the free use of gas for domestic purposes in his residence on the leased premises, provided there shall be surplus gas produced on said premises over and above enough to fully operate the same. Failure on the part of the lessee to use a gas producing well, which cannot profitably be utilized at the rate herein prescribed, shall not work a forfeiture of this lease so far as the same relates to mining oil, but if the lessee desires to retain as producing privileges, the lessee shall pay a rental of one hundred dollars per annum, in advance, calculated from the date of discovery of gas, on each gas producing well, gas from which is not marketed or not utilized otherwise than for operations under this lease. Payments of annual gas royalties shall be made [fol. 29] within twenty-five days from the date of such royalties become due, other royalty payments to be made monthly on or before the 25th day of the month succeeding that for which such payment is to be made, supported by sworn statements.

3. Until a producing well is completed on said premises the lessee shall pay, of cause to be paid, to said Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, for lessor, as advanced annual royalty, from the date of the approval of this lease, fifteen cents per acre per annum, annually, in advance for the first and second years; thirty cents per acre per annum, annually, in advance, for the third and fourth years; seventy-five cents per acre per annum, annually, in advance, for the fifth year; and one dollar per acre per annum, annually, in advance, for each succeeding year of the term of this lease; it being understood and agreed that such sums of money so paid shall be a credit on stipulated royalties, and the lessee hereby agrees that said advance royalty when paid shall not be

refunded to the lessee because of any subsequent surrender or *cancellation thereof*; nor shall the lessee be relieved from its obligation to pay said advance royalty annually when it becomes due, by reason of any subsequent surrender or cancellation of this lease.

4. The lessee shall exercise diligence in sinking wells for oil and natural gas on land covered by this lease and shall drill at least one well thereon within one year from the date of approval of this lease by the Secretary of the Interior, or shall pay to said Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, for the use and benefit of the lessor, for each whole year the completion of such well is delayed after the date of such approval by the Secretary of the Interior, for not to exceed ten years from the date of such approval, in addition to the other considerations named herein, a rental of one dollar per acre, payable annually; and if the lessee shall fail to drill at least one well within any such yearly period and shall fail to surrender this lease by executing and recording a proper release thereof and otherwise complying with paragraph numbered 7 hereof on or before the end of any such year during which the completion of such well is de-[fol. 30] layed, such failure shall be taken and held as conclusively evidencing the election and covenant of the lessee to pay the rental of one dollar per acre for such year and thereupon the lessee shall be absolutely obligated to pay such rental. The failure of the lessee to pay such rental before the expiration of fifteen days after it becomes due at the end of any yearly period, during which a well has not been completed as provided herein, shall be a violation of one of the material and substantial terms and conditions of this lease, and be cause for cancellation of such lease under paragraph numbered 9 hereof; but such cancellation shall not in any wise operate to release or relieve the lessee from the covenant and obligations to pay such rental, or any other accrued obligation. The lessee may be required by the Secretary of the Interior, or by such officer as may be designated by him for the purpose to drill and operate wells to offset wells on adjoining tracts, and within three hundred feet of the dividing line, or in case of gas wells lessee may have the option, in lieu of drilling offset wells, of paying a sum equal to the royalties which would accrue on each well to be offset if said wells had been drilled and

were being operated on the land described herein and in accordance with the terms hereof. It is understood and agreed by the parties hereto that offset wells shall be drilled or royalty paid in lieu of drilling, within ten days after the lessee is notified to do so, and failure to comply with such requirements shall constitute a violation of one of the substantial terms of this lease.

5. The lessee shall carry on development and operations in a workmanlike manner, commit no waste on the said land and suffer none to be committed upon the portion in his occupancy or use, take good care of the same and promptly surrender and return the premises upon the termination of this lease to lessor or to whomsoever shall be lawfully entitled thereto, unavoidable casualties excepted shall not remove therefrom any buildings or permanent improvements erected thereon during the said term by the said lessee, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, excepting tools, derricks, boiler, boiler houses, pipe lines, [fol. 31] pumping and drilling outfits, tanks, engines and machinery, and the casing of all dry or exhausted wells which shall remain the property of the lessee, and may be removed at any time prior to sixty days after the termination of the lease by forfeiture or otherwise; and shall not permit any nuisance to be maintained on the premises under lessee's control nor allow any intoxicating liquors to be sold or given away for any purposes on such premises; shall not use such premises for any other purpose than those authorized in the lease; and before abandoning any well shall securely plug the same so as effectually to shut off all water from the oil-bearing stratum, or in the manner required by the laws of the State of Oklahoma.

6. The lessee shall keep an accurate account of all oil-mining operations, showing the sales, prices, dates, purchases, and the whole amount of oil mined or removed; and all sums due as royalty shall be a lien on all implements, tools, movable machinery, and all other personal chattels used in operating said machinery and also upon all of the unsold oil obtained from the land herein leased, as security for payment of said royalty.

7. The lessee may at any time, by paying to the Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma,

all amounts then due as provided herein and the further sum of one dollar, surrender and cancel this lease and be relieved from all further obligations or liability thereunder; Provided, if this lease has been recorded lessee shall execute a release and record the same in the proper county recording office: Provided, further, in event restrictions are moved from all leased premises, the lessee may surrender all the undeveloped portion thereof by paying the lessor all amounts then due and the further sum of one dollar, which surrender shall not affect the terms hereof as to each producing well and ten acres of said premises as nearly in square form as possible next contiguous to and surrounding each of said wells, and execute and record a cancellation of premises surrendered.

8. This lease shall be subject to the regulations of the Secretary of the Interior, now or hereafter in force, relative to such leases, all of which regulations are made a part and [fol. 32] condition of this lease: Provided, however, that no regulations made after the approval of this lease, affecting either the length of term of oil and gas leases, the rates of royalty or payment thereunder, of the assignment of leases, shall operate to affect the terms and conditions of this lease.

9. Upno the violation of any of the substantial terms and conditions of this lease the Secretary of the Interior (or lessor, in event restrictions are removed as provided in paragraph 12 hereof) shall have the right, at any time after thirty days' notice to the lessee specifying the terms or conditions violated, to declare this lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land.

10. Before this lease shall be in force and effect the lessee shall furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, and such further bond or bonds as may be required by said Secretary, conditioned for the performance of this lease, which bond shall be deposited and remain on file in the Indian office.

11. Assignment of this lease or any interest therein may be made with the approval of the Secretary of the Interior, it being understood that to secure such approval the proposed assignee need only be qualified to hold such a lease under the rules and regulations, and furnish a bond with responsible surety to the satisfaction of the Secretary of



the Interior, conditioned for the faithful performance of the covenants and conditions of this lease.

12. In event restrictions on alienation shall be removed from all the lease hold premises described above, this lease shall be released from the supervision of the Secretary of the Interior, such release to take effect without further agreement, from the date such restrictions are removed, and thereupon the authority and power delegated to the Secretary of the Interior as herein provided shall cease, and all payments required to be made to said Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, shall thereafter be made to lessor or the then owner of said lands in person or be deposited to the credit of said lessor [fol. 33] or his assigns at the First National Bank of Konawa, Okla., or such other place as the said lessor or his assigns may from time to time designate in writing, and changes in regulations thereafter made by the Secretary of the Interior applicable to oil and gas leases shall not apply to this lease.

13. Each and every clause and covenant in this indenture shall extend to the heirs, executors, administrators, successors, and lawful assigns of the parties hereto.

14. In Witness Whereof, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

Lucy (her thumb print mark). (Seal.) M. F. Graham. (Seal.) — —. (Seal.)

Attest: — —.

Two witnesses to execution by lessor: Louis Fife, P. O. Seminole, Okla.; B. H. McKellop, P. O. Wewoka, Okla.

Two witnesses to execution by lessee: (Signature illegible), P. O. Okmulgee, Okla.; L. W. McLean, P. O. Okmulgee, Okla.

Royalty No. 61913

Received Feb. 19, 1920. No. 856. Supt. Five Civilized Tribes.

STATE OF OKLAHOMA,

County of Seminole, ss:

Before me, Notary Public in and for said county and State, on this — day of January, 1920, personally appeared

[fol. 34] Lucy Roll #1563 to me known to be the identical person— who executed the within and foregoing lease, by her mark, in my presence and in the presence of B. H. McKellop & Louis Fife as witnesses, and acknowledged to me that she executed the same as her free and voluntary act and deed for the uses and purposes therein set forth.

J. E. Louise, Notary Public.

(My commission expires Aug. 2nd, 1925.)

Department of the Interior, Office of the Superintendent for the Five Civilized Tribes, Muskogee, Okla., Jan. 28, 1920

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be Approved. See my report of even date.

Joe H. Strain, Acting Superintendent for the Five Civilized Tribes.

Department of the Interior, Office of Indian Affairs, Washington, D. C., Feb. 5, 1920

Respectfully submitted to the Secretary of the Interior, with recommendation that it be Approved.

E. B. Meritt, Assistant Commissioner. (Seal.)

Department of the Interior, Washington, D. C., Feb. 12, 1920

Approved.

William H. Lane, Secretary of the Interior.

Filed in the office of the Superintendent for the Five Civilized Tribes this 13 day of Jany, 1920, at 11 o'clock a. m.

Gabe E. Parker, Superintendent, by A. M. McMillan.

Advance Royalty Received, \$10.35.

[fol. 35] Ent 7-13-20.

Received Jun 24 1920. No. 3501.

5-154r

Lease No. 41483

Department of the Interior, Washington, D. C.

Jun 17 1920.

The assignment of this lease by M. F. Graham to Earle G. Hastings is Approved, effective only from date of

approval, subject to the orders and regulations of this Department now existing or hereafter to be promulgated. The price basis for computation of royalty on oil shall be the market price as ascertained and declared by the Secretary of the Interior, and the royalty shall be 12½ per cent on such price basis.

S. G. Hopkins, Assistant Secretary.

• 35928 Can  
 plus 28.07 Acres  
 me 39.97 "  
 mestead and Surplus Oct. 27-04  
 herein was regularly allotted on Aug. 19-01  
 Lucy, who is 22 year  
 Full blood Seminole Roll No. 1563.  
 n. 15th 1920. M.W.C.

### Department of the Interior

#### Office of Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians and the disposition of the land of said tribes, and that the above and foregoing is a true and [fol. 36] correct copy of Oil and Gas Mining Lease by and between Lucy and M. F. Graham, dated *January 5, 1920*.

July 15, 1941.

J. T. Wilkinson, Asst. to Superintendent. (Seal.)

### IN UNITED STATES DISTRICT COURT

#### **Findings of Fact and Conclusions of Law**—Filed December 23, 1941

This action was instituted by the United States for itself and in behalf of the estate of Lucy Bemore, deceased, full-blood Seminole Indian, to recover the sum of \$5,925.20, with interest, representing the amount assessed by the Oklahoma Tax Commission as an inheritance tax upon the

\*—Omitted letters illegible on copy.



transfer of the estate of said Lucy Bemore, who died intestate December 23, 1932. The tax was paid under protest by the Secretary of the Interior and the United States, and this action is to recover same pursuant to the provisions of 68 Okl. Stat. Ann., Sec. 1475.

The cause was tried before the Court and submitted upon written briefs of the parties. The material facts were stipulated.

### FINDINGS OF FACT

The facts as stipulated were reduced to writing, signed by the parties and filed herein. The Court finds the facts to be as stipulated. Briefly summarized the essential facts for determination of this cause are as follows:

#### I

Lucy Bemore is one and the same person as Lucy.

#### II

Lucy Bemore was a full-blood Seminole Indian, enrolled as such opposite Seminole Roll No. 1563. She died intestate, December 23, 1932, while domiciled in and a resident in good faith of the State of Oklahoma. She left surviving her husband, Lewis Bemore, a one-fourth blood Creek Indian; and her son Thomas, (also known as Thomas Coon), an unenrolled full-blood Seminole Indian, who inherited her estate in equal shares.

[fol. 37]

#### III

Lucy Bemore died seized of the following estate:

Real Property.

Her homestead allotment consisting of 39.97 acres.

Her surplus allotment consisting of 28.07 acres.

Forty-three acres of land purchased for her out of restricted funds, title to which was taken on a restricted form of deed. (The date of this purchase and the date specified for expiration of the restrictions do not appear in the stipulation.)

Personal Property.

U. S. Treasury Bonds purchased for her account out of proceeds from the sale of oil and gas produced from her allotted lands,

Cash credit on the books of the Interior Department representing proceeds from the sale of said oil and gas (both the bonds and the cash were in the custody of and in the control of the Secretary of the Interior at the time of the death of Lucy Bemore.)

The gross value of said estate was \$264,212.18, and was valued by the Oklahoma Tax Commission for inheritance tax purposes at the net value of \$250,630.77.

#### IV

A certificate designating Lucy Bemore's homestead and surplus allotments as tax-exempt was filed for record in the office of the County Clerk of Seminole County Oklahoma, on May 23, 1930.

#### V

The Secretary of the Interior, never at any time issued any instrument removing restrictions on said lands or any part thereof; and all of the funds, belong to decedent at the time of her death, were then and have been at all times since then, retained under the supervision and control of the Secretary of the Interior and the credits therefor were carried upon the books of said Department, kept by the Superintendent for the Five Civilized Tribes at Muskogee, [fol. 38] Oklahoma, except that one-half of the funds, which passed to decedent's husband were released to him shortly after her death.

#### VI

The defendant Oklahoma Tax Commission, acting pursuant to the Oklahoma Inheritance Tax Law in force at the time of Lucy's death, assessed an inheritance tax upon the transfer of said estate in the sum of \$5,925.20, which is agreed to be the correct amount of tax if said transfer is taxable in its entirety.

#### VII

On December 10, 1940, the Secretary of the Interior paid said tax to the defendant, under written protest; and at such time the Secretary gave notice in writing to the defendant of his intention to file suit for the recovery of said tax.

## CONCLUSIONS OF LAW

## I

This is a suit of a civil nature, brought by the United States of which this court has original jurisdiction. 28 U. S. C. A. Sec. 41 (1).

## II

All of the real property with the possible exception of the forty-three acres of purchased lands after April, 1931, was restricted during Lucy's life. Her homestead and surplus allotments were tax-exempt. The income derived from her allotted lands and the personal property in the custody and control of the Secretary of the Interior was restricted.

With the possible exception above noted, all the property, real and personal, was restricted in the hands of the full-blood heir, and his interest in the tax-exempt lands was likewise tax-exempt. Both the real and personal property inherited by the quarter-blood heir became unrestricted and taxable. Secs. 1 and 8, Act of January 27, 1933 (47 Stat. 777); Sec. 9, Act of May 27, 1908 (35 Stat. 315) as amended by Sec. 1, Act of April 12, 1926 (44 Stat. [fol. 39] 239); Sec. 2, Act of May 10, 1928 (45 Stat. 495); Glenn v. Lewis, 105 F. (2d) 398.

## III

The applicable Oklahoma Law provides as follows:

"A tax is hereby laid upon the transfer to persons . . . of property . . ."

When the transfer is of tangible property in this State made by any person, or of intangible property made by a resident of this State at the time of transfer:

First: By will or the intestate laws of this State; . . ."  
Chap. 162, S. L. Okla., 1915, as amended by Chap. 112, S. L. Okl., 1927, and found in Secs. 12469 et seq., Okl. Stat. 1931.

## IV

An inheritance tax or transfer tax such as is provided by the Oklahoma law is not levied on the property of which

the estate is composed. It is an excise tax upon the shifting of economic benefits, on the privilege of transferring property at death, on the transitus of the property from the dead to the living, *United States Trust Co. v. Helvering*, 307 U. S. 57; *United States v. Perkins*, 163 U. S. 625, *McGannon v. State*, 33 Okl. 145, 124 P. 1063, *Knowlton v. Moore*, 178 U. S. 41, *Landman v. Commissioner of Internal Revenue* (C. C. A. 10th) 123 F. (2d) —, decided November 11, 1941, and cases cited therein.

## V

This case is primarily concerned with the question of whether or not a transfer or inheritance tax may be levied by the State of Oklahoma upon the transfer of the estate of a full-blood Indian which estate consisted principally of restricted property, restricted in the hands of the decedent and both restricted and unrestricted in the hands of the heirs. A tax upon the transfer of property is valid even though the property is restricted and tax-exempt. *Plummer v. Cole*, 178 U. S. 116; *Orr v. Gilman*, 183 U. S. 278; *United States Trust Co. v. Helvering*, *supra*. The transfer of the restricted estate of a full-blood restricted member of one [fol. 40] of the Five Civilized Tribes is subject to the Federal Estate Tax. Such an estate is not deemed exempt from a transfer tax on the ground that it is a Federal instrumentality. It is not deemed a Federal instrumentality. *Landman v. Commissioner of Internal Revenue*, *supra*, and cases cited therein.

## VI

The estate herein passed under the intestate laws of the State of Oklahoma. Members of the Five Civilized Tribes are citizens of the State of Oklahoma, *Bolen v. Nebraska*, 176 U. S. 831, *Hickman v. United States*, 224 U. S. 413. As to the members of the Five Civilized Tribes it has been the policy of Congress to subject the estates of members of said tribes to the control of the local laws of succession. Sec. 23 of the Act of April 26, 1906 (34 Stat. 137) as amended; Sec. 9 of the Act of May 27, 1908 (35 Stat. 312) as amended; *Blundell v. Wallace*, 267 U. S. 373, *Jackson v. Harris* (C. C. A. 10th) 43 F. (2d) 513; *Jefferson v. Fink*, 247 U. S. 288; *Dunn v. Micco* (C. C. A. 10th) 106 F. (2d) 356.

## VII

Congress has the power to control the devolution of the estates of members of the Five Civilized Tribes. The State of Oklahoma concedes that Congress has this power, but contends that Congress has seen fit, by its various acts, to make applicable the laws of the State of Oklahoma to the devolution of the estates of the members of the Five Civilized Tribes. The construction of these acts of Congress and a consideration of whether or not the laws of Congress or the laws of the State of Oklahoma control the devolution of the estates of members of the Five Civilized Tribes is a Federal question and the decisions of the Federal courts are controlling. The Federal decisions, both of the Circuit Court, and the Supreme Court in *Blundell v. Wallace*, *supra*, seem to settle this question in favor of defendant's contention. *Childers v. Beaver*, 270 U. S. 555 and *Blanset v. Cardin*, 256 U. S. 319, relied upon by the Government involved the estate of a Quapaw Indian and a construction of the Act of June 25, 1910 (36 Stat. 855) applicable to the Quapaw Indians. This act of Congress, Sec. 33 provides: "That the provisions of this Act shall not apply to the [fol. 41] Osage Indians, nor to the Five Civilized Tribes, in Oklahoma, \* \* \*."

## VIII

The estate in question passed under the intestate laws of the State of Oklahoma and the transfer of said estate is subject to the tax provided in Article 5, Chap. 66, S. L. of Oklahoma, 1935. The Government can not recover the tax that has been paid to the State of Oklahoma. Judgment is for the defendant.

The attorney for the defendant will prepare proper decree to be submitted to attorneys for plaintiff and to the Court for approval and entry of judgment on the thirtieth day of December, 1941.

Dated this twenty third day of December, 1941.

Eugene Rice, District Judge.

[File endorsement omitted.]

## IN UNITED STATES DISTRICT COURT

JUDGMENT—December 30, 1941

Now on this 30th day of December, 1941, there came on for entry of judgment the above numbered and entitled cause, pursuant to regular assignment and as directed by the court; the plaintiff United States of America, appeared by Cleon A. Summers, United States Attorney, and William H. Landram, Assistant United States Attorney for the Eastern District of Oklahoma, and the defendant appeared by F. M. Dudley, Attorney for the Oklahoma Tax Commission of the State of Oklahoma, and no other appearances were made. The court finds that heretofore the parties have entered into a written stipulation of facts and filed the same in said cause and that no other testimony was introduced. The court further finds that both parties waived trial by jury and filed in said cause briefs and submitted said case on said briefs and stipulation of facts to the court; the court, after having considered the facts and briefs of both plaintiff and defendant, filed in said cause on the 23rd day of December, 1941, Findings of Fact and Conclusions of Law.

[fol. 42] It Is Therefore Ordered, Adjudged and Decreed by the Court that according to the Findings of Fact and Conclusions of Law filed herein, the defendant, Oklahoma Tax Commission of the State of Oklahoma, have judgment in its favor and judgment is therefore rendered for the defendant, Oklahoma Tax Commission of the State of Oklahoma, and it is adjudged that the defendant go hence without day; defendant to pay costs.

Dated this 30th day of December, 1941.

Eugene Rice, District Judge.

OK: as to form.

Cleon A. Summers, William H. Landram, Attorneys  
for Plaintiff. F. M. Dudley, Attorney for Defendant.

[File endorsement omitted.]



## IN UNITED STATES DISTRICT COURT

## NOTICE OF APPEAL—Filed March 28, 1942

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit from the final judgment entered in this action on December 30, 1941.

United States of America, by William H. Landram, Assistant United States Attorney, Attorney for Appellant, Federal Building, Muskogee, Muskogee, Oklahoma.

## Notice of the Filing of Notice of Appeal

To F. M. Dudley, Attorney for Oklahoma Tax Commission, State Capitol Building, Oklahoma City, Oklahoma:

Please take notice that the United States of America filed [fol. 43] in the above styled case on the 28th day of March, 1942, a notice of appeal to the United States Circuit Court of Appeals for the Tenth Circuit.

Dated this 28th day of March, 1942.

John H. Pugh, Clerk, U. S. District Court for the Eastern District of Oklahoma, by Broadus Martin, Deputy.

STATE OF OKLAHOMA,  
County of Muskogee, ss:

The undersigned, of lawful age, being first duly sworn upon his oath, deposes and states:

That on the 28th day of March, 1942, he enclosed a copy of the above and foregoing notice of appeal and notice of the filing of the notice of appeal in an envelope addressed to F. M. Dudley, Attorney, Oklahoma Tax Commission, State Capitol Building, Oklahoma City, Oklahoma, and after securely sealing said envelope affiant states that he deposited it in the United States Post Office at Muskogee, Oklahoma, on the date aforesaid, and being United States Government mail required no postage.

John H. Pugh, Clerk, U. S. District Court for the Eastern District of Oklahoma, by Broadus Martin, Deputy.

Subscribed and sworn to before me this 28th day of March, 1942. Eugene Wheeler, Notary Public. (Seal.) My commission expires 9-4-44.

I acknowledge receipt of a copy of the Notice of Appeal from William H. Landram, Assistant United States Attorney for the Eastern District of Oklahoma, attorney for the plaintiff herein.

F. M. Dudley, Attorney for the Defendant, Oklahoma Tax Commission.

[File endorsement omitted.]

[fol. 44] [Appellant's statement of points relied on, filed in the district court, is identical with the statement which appears at page 1.]

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IN UNITED STATES DISTRICT COURT

STIPULATION DESIGNATING PARTS OF THE RECORD, PROCEEDINGS  
AND EVIDENCE TO BE INCLUDED IN THE RECORD ON APPEAL—  
Filed May 5, 1942

It is stipulated and agreed by and between the plaintiff, United States of America, by William H. Landram, Assistant United States Attorney for the Eastern District of Oklahoma, and the defendant, Oklahoma Tax Commission, by A. Francis Porta, attorney for said defendant, that the record on appeal in the above numbered and entitled cause shall include the following:

1. Complaint and Exhibits of Plaintiff.
2. Answer of Defendant.
3. Stipulation and Agreement filed herein on July 15, 1941.
4. Order Admitting Certain Patents and Oil and Gas Lease into Evidence.
5. Findings of Fact and Conclusions of Law.
6. Judgment.
7. Statement of Points on which Plaintiff Intends to Rely on Appeal.
8. Stipulation Designating Parts of the Record, Proceedings and Evidence to be included in the Record on Appeal.

9. Order Extending the Time for Filing the Record on Appeal and Docketing the Action.

10. Notice of Appeal.

[fols. 45-48] Said Stipulation and Agreement is entered into by authority of Rule 75(f) Rules of Civil Procedure for the District Courts of the United States.

United States of America, Plaintiff, by William H. Landram, Assistant United States Attorney, Attorney for Plaintiff; Oklahoma Tax Commission, Defendant, by A. Francis Porta, Attorney for Defendant.

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IN UNITED STATES DISTRICT COURT

ORDER EXTENDING THE TIME FOR FILING THE RECORD ON APPEAL AND DOCKETING THE ACTION—Filed May 2, 1942

Now on this 2nd day of May, 1942, for good cause shown, it is ordered that the time for filing the record on appeal and docketing the action is extended for a period of thirty (30) days from the date hereof.

Eugene Rice, Judge.

[File endorsement omitted.]

Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 49] IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE TENTH CIRCUIT

No. 2559

UNITED STATES OF AMERICA, Appellant,

vs.

OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,  
Appellee

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO  
RELY ON APPEAL, AND DESIGNATION OF PARTS OF THE REC-  
ORD TO BE PRINTED—Filed May 15, 1942

Comes now the above named appellant, United States of America, by William H. Landram, Assistant United States Attorney for the Eastern District of Oklahoma, and pur-

suant to Rule 13 of the Revised Rules of the United States Circuit Court of Appeals for the Tenth Circuit, states that the point on which appellant intends to rely on appeal in the above case is as follows:

1. No part of the restricted estate of a deceased allottee of the Five Civilized Tribes of Oklahoma is subject to the estate and inheritance tax laws of the State of Oklahoma.

#### **Designation of Parts of Record and Proceedings To Be Printed**

The Clerk will cause to be printed for the consideration of the court in deciding this case the following parts of the record:

1. Complaint and Exhibits of Plaintiff.
2. Answer of Defendant.
3. Stipulation and agreements filed July 15, 1941.
4. Order Directing Exhibits Attached to Stipulation and Agreement be Admitted into Evidence.
5. Order Admitting Certain Patents and Oil and Gas Lease into Evidence.
- [fol. 50] 6. Findings of Fact and Conclusions of Law.
7. Judgment.
8. Notice of Appeal.
9. Order Extending the Time for Filing the Record on Appeal and Docketing the Action.
10. Statement of Points on which the United States of America Intends to Rely on Appeal.
11. Stipulation Designating Parts of the Record, Proceedings and Evidence to be Included in the Record on Appeal.
12. This Statement of Points on which Appellant Relies and Designation of Parts of the Record to be Printed.

United States of America, by William H. Landram,  
Assistant United States Attorney, Attorney for  
Appellant.

STATE OF OKLAHOMA,

County of Muskogee, ss:

**Affidavit of Mailing**

William H. Landram, of lawful age, being first duly sworn upon his oath, deposes and states:

That on the 13th day of May, 1942, he enclosed a copy of the above and foregoing statement of points on which appellant intends to rely on appeal, and designation of parts of the record and proceedings to be printed, in an envelope addressed to A. Francis Porta, Attorney, Oklahoma Tax Commission, State Capitol Building, Oklahoma City, Oklahoma; said envelope was securely sealed, and being United States Government mail required no postage; said affiant deposited said envelope in the United States Post Office at Muskogee, Oklahoma, on the date aforesaid.

William H. Landram.

Subscribed and sworn to before me this 13th day of May, 1942. Chas. T. Diffendaffer, Notary Public.  
My commission expires 10-17-1945. (Seal.)

[File endorsement omitted.]

---

[fol. 51] IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF OKLAHOMA

Civil Action No. 417

UNITED STATES OF AMERICA, Plaintiff,

vs.

OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,  
Defendant

COMPLAINT—Filed December 6, 1940

Comes now the plaintiff, United States of America, by Cleon A. Summers, United States Attorney for the Eastern District of Oklahoma, and William H. Landram, Assistant United States Attorney, by authority of the Attorney General of the United States, and at the request of the Secre-

tary of the Interior, in its own behalf and for and on behalf of the Estate of Nitey, deceased full-blood Seminole Indian, enrolled as such opposite Roll No. 1446, and for cause of action against the defendant alleges and states.

## I

That the defendant, Oklahoma Tax Commission, was created by the laws of the State of Oklahoma and given the power and authority to make assessments and collections, among other things, of estate and inheritance taxes levied and assessed against estates of deceased persons within the State of Oklahoma;

## II

That Nitey, full-blood restricted Indian, enrolled as such opposite Roll No. 1446, departed this life on or about August 17, 1930, while a resident in good faith of the State of Oklahoma; that according to law the real and personal property belonging to the said Nitey, now deceased, was [fol. 52] restricted from alienation, encumbrance and taxation; that said property was under the control and supervision of the Superintendent for the Five Civilized Tribes, the Secretary of the Interior, and the plaintiff herein; that the said Nitey, now deceased, was at all times during her lifetime a ward of the plaintiff herein;

## III

That the defendant herein assessed the estate of Nitey, a deceased restricted member of the Five Civilized Tribes, as estate and inheritance taxes, the sum of Sixteen Thousand Fifty-three and 74/100 Dollars (\$16,053.74); that the Secretary of the Interior and plaintiff herein on the 3rd day of December, 1940, paid to the defendant herein, under protest, the amount of the assessment of said taxes in the sum of Sixteen Thousand Fifty-three and 74/100 Dollars (\$16,053.74); a duplicate copy of an official receipt of payment of said taxes to said defendant is hereto attached, marked Exhibit "A", incorporated herein and made a part hereof.

## IV

Plaintiff further alleges and states that all property belonging to the estate of Nitey, a deceased restricted mem-



ber of the Five Civilized Tribes, is restricted and subject to and under the control and supervision of the Secretary of the Interior and the plaintiff by Acts of Congress and laws of the United States;

## V

Plaintiff further alleges and states that the defendant had no right, authority or power, either at law or in equity, to assess the estate of Nitey a deceased restricted member of the Five Civilized Tribes, for inheritance and estate taxes, as same is an assessment against the plaintiff herein and contrary to law; that the said plaintiff is entitled to recover the amount of the assessment paid to the defendant by the plaintiff herein.

## VI

That there was allotted and patented to Nitey as her [fol. 53] homestead allotment the non-taxable and restricted lands described as follows:

Lot One (1), (or the NE $\frac{1}{4}$  of NE $\frac{1}{4}$ ) of Section Two (2), Township Seven (7) North, Range Six (6) East, Seminole County, Oklahoma;

A certified photostatic copy of the homestead allotment deed is attached hereto, marked Exhibit "B" and made a part hereof.

## VII

That there was allotted and patented to Nitey as her surplus allotment the non-taxable and restricted land described as follows:

East Half of the Southeast Quarter of Section Thirty-five, Township Eight (8) North, Range Six (6) East, and the South Half of the Northeast Quarter and Lot Two (2), (or NW $\frac{1}{4}$  of NE $\frac{1}{4}$ ) of Section Two (2), Township Seven (7) North, Range Six (6) East, Seminole County, Oklahoma;

A certified photostatic copy of the surplus allotment deed is attached hereto, marked Exhibit "C" and made a part hereof.

## VIII

That a certificate designating 160 acres of the above described lands as tax exempt was filed for record in the

office of the County Clerk of Seminole County, Oklahoma, on December 3, 1930; a certified photostatic copy of said certificate is attached hereto, marked Exhibit "D" and made a part hereof.

## IX

Plaintiff further alleges and states that at the time of making said payment of taxes to the Tax Commission it gave notice to said Tax Commission of its intention to file suit for recovery of said taxes; said notice so given is attached hereto, marked Exhibit "E", incorporated herein and made a part hereof.

Wherefore, plaintiff demands judgment against the defendant in the sum of Sixteen Thousand Fifty-three and 74/100 Dollars (\$16,053.74), plus interest at the rate of 3% per annum from the date of payment by said Secretary of the Interior and plaintiff herein until paid; plaintiff further demands that the said defendant be permanently enjoined and restrained from assessing or collecting estate or inheritance taxes from the estate of a deceased member of the Five Civilized Tribes, and more particularly the estate of Nitey, full-blood restricted Seminole Indian, now deceased, and such temporary and permanent relief as plaintiff may show itself entitled, and for its costs herein expended.

Cleon A. Summers, United States Attorney, William  
H. Landram, Assistant United States Attorney.

[File endorsement omitted]

[Vol. 55-56]

## OTC Form C-102

## EXHIBIT A TO COMPLAINT

State of Oklahoma  
Oklahoma Tax Commission  
Oklahoma City, Oklahoma

The report or return hereby acknowledged, as stated below, is accepted subject to final audited tax liability.

The accompanying remittance is subject to final audit and solvent credits. Penalties, as provided by law, will attach the same as if no remittance had been made, when, for any reason checks, drafts or other exchange are returned unpaid.

## Key Letter Shows Kind of Tax Paid

A—Motor Fuel	L—Fuels Excise
B—Corporation License	M—Sales Tax
C—Gross Production	N—Cigarette
D—Inheritance Tax	P—Proration Fund
E—Income Tax	Q—Beverage
F—Mileage Tax	R—Freight Car Tax
G—Use Tax	T—Alcohol Permit
H—Special Fuel Use	U—Used Equipment
K—Miscellaneous Tax	V—Tokens

Total Tax Payable	Amount of Remittance	Unpaid Balance
	16,053.74	

Dec 2 40

Official Receipt of  
Report, Or Return and  
Remittance As Shown

Receipt  
Number

State

Name of Taxpayer  
Street, R. F. D. or Box  
City or Town

Nitey, Dec'd Full Blood Seminole # 1446  
U S of America Through the Five Tribe  
Agency Muskogee Okla

1,490 D

G. H. STORMS, Cashier.

[fol. 57]

## EXHIBIT B TO COMPLAINT

Homestead Allotment Deed No. 1414 MC.

Seminole Roll 1446

The Seminole Nation,  
State of Oklahoma:

To All to Whom these Presents Shall Come, Greeting:

Whereas, by an agreement between the United States and the Seminole Nation, ratified by the Council of the Seminole Nation on December 24, 1897, and by act of Congress approved July 1, 1898 (30 Stat. L., 567), it was provided that all lands belonging to the Seminole tribe of Indians shall be allotted among the members of said tribe, and

Whereas, It was provided by said act of Congress that "each allottee shall designate one tract of forty acres, which shall by the terms of the deed be made inalienable and nontaxable as a homestead in perpetuity," and

Whereas, It was provided by the act of Congress approved March 3, 1903 (32 Stat. L., 1008), that for the homestead referred to in the aforesaid act of Congress a separate deed shall issue, and

Whereas, The Commissioner to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of Nitey as a Homestead allotment, and that the said allottee has been duly enrolled with the approval of the Secretary of the Interior as a full-blood citizen of said tribe opposite No. 1446 on the approved roll;

Now, therefore, I, the undersigned, the Principal Chief of the Seminole Nation, by virtue of the power and authority vested in me by law, have granted and conveyed, and by these presents do grant and convey unto the said Nitey all right, title, and interest of the Seminole Nation and of all other members of said Nation, in and to the following-described lands, viz:

Lot One (1) of Section Two (2), Township Seven (7) North and Range Six (6) East of the Indian Base and Meridian, in the State of Oklahoma, containing Forty (40) [fol. 58] acres more or less, according to the United States survey thereof, which shall be inalienable and nontaxable

as a homestead in perpetuity, subject, however, to all acts of Congress pertaining to or in any way affecting the Leasing, Incumbrance, or Alienation of said land.

In Witness Whereof, I, the Principal Chief of the Seminole Nation, have hereunto set my hand and caused the great seal of said Nation to be affixed this 27th day of March, A. D. 1913.

John F. Brown, Principal Chief of the Seminole Nation. (Seal.)

Department of the Interior

Approved: May 6, 1913.

Franklin K. Lane, Secretary. By G. F. Farrell, Clerk.  
Record on the 15th day of May, 1913, at 1 o'clock P. M.

Department of the Interior

Office of Superintendent for the Five Civilized Tribes,

Muskogee, Oklahoma

This is to certify that I am the officer having custody of the records of deeds of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Nations, and the above and foregoing is a true and correct copy of the deed issued to Nitey, Seminole 1446, full blood, as the name appears of record in Book No. 5-A, page 354, of Seminole Homestead Deed Records.

J. T. Wilkinson, Asst. to Superintendent. (Seal).  
January 3, 1941.

[fol. 59] EXHIBIT C TO COMPLAINT

Surplus Allotment Deed No. 1414 MC  
Seminole Roll No. 1446

THE SEMINOLE NATION,  
State of Oklahoma:

To all to whom these presents shall come, Greeting:

Whereas, By an agreement between the United States and the Seminole Nation, ratified by the Council of the Seminole Nation on December 24, 1897, and by act of Con-

gress approved July 1, 1898 (30 Stat. L., 567), it was provided that all lands belonging to the Seminole Tribe of Indians shall be allotted among the members of said tribe, and

Whereas, It was provided by the act of Congress approved March 3, 1903 (32 Stat. L., 1008), that for the homestead referred to in the aforesaid act of Congress a separate deed shall issue, and

Whereas, The Commissioner to the Five Civilized Tribes has certified that the land hereinafter described had been selected by or on behalf of Nitey as a Surplus allotment and that the said allottee has been duly enrolled with the approval of the Secretary of the Interior as a full-blood citizen of said tribe opposite No. 1446 on the approved roll;

Now, therefore, I, the undersigned, the Principal Chief of the Seminole Nation, by virtue of the power and authority vested in me by law, have granted and conveyed, and by these presents do grant and convey, unto the said Nitey all right, title, and interest of the Seminole Nation and of all other members of said nation in and to the following described lands, viz: Lot Two (2) and the South Half of the North East Quarter of Section Two (2), Township Seven (7) North and Range Six (6) East, and the East Half of the South East Quarter of Section Thirty-Five (35), Township Eight (8) North and Range Six (6) East of the Indian [fol. 60] Base and Meridian, in the State of Oklahoma, containing 200.16 acres, more or less, according to the United States survey thereof, subject to all acts of Congress pertaining to or in any way affecting the Leasing, Incumbrance, or Alienation of said land.

In witness whereof, I the Principal Chief of the Seminole Nation, have hereunto set my hand and caused the great seal of said nation to be affixed this 27th day of March, A. D. 1913.

John F. Brown, Principal Chief of the Seminole Nation. (Seal.)

Department of the Interior

Approved May 6, 1913.

Franklin K. Lane, Secretary, By G. F. Farrell, Clerk.

Record- on the 15 day of May, 1913, at 1 o'clock P. M.



Department of the Interior.

Office of Superintendent for the Five Civilized Tribes,  
Muskogee, Oklahoma

This is to certify that I am the officer having custody of the records of deeds of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Nations, and the above and foregoing is a true and correct copy of the deed issued to Nitey, Seminole 1446, full blood as the name appears of record in Book No. 5-A, page 354, of Seminole Allotment Deed Records.

J. T. Wilkinson, Asst. to Superintendent. (Seal.)  
January 3, 1941.

[fol. 61]

EXHIBIT D TO COMPLAINT

Certificate 541

On Designating Lands Exempt From Taxation

Five Civilized Tribes.

Book 441, Page 49

12627

Wewoka, Okla., June 23, 1930.

Pursuant to Section 4 of the Act of Congress of May 10, 1928 (Public No. 360—70th Congress), the following described restricted Indian lands belonging to Nitey, an Incompetent, Wewoka, Oklahoma, a full-blood citizen of the Seminole Nation, Roll No. 1446, are hereby selected and designated as tax exempt as long as the title thereto remains in the said Nitey, an Incompetent, or in any full-blood Indian heir or devisee of said lands, such tax exemp-

tion, in no event, however, to extend beyond April 26, 1956.

Subdivision	Sec.	Twp.	Range	Area	County
Lot 1 .....	2	7N	6E✓	40	Seminole✓
S 40 ac. of Lot 2 .....	2	7N	6E✓	40	Seminole✓
S 2 NE .....	2	7N	6E✓	80	Seminole✓

\* A. G. McMillan, Acting Superintendent for the Five Civilized Tribes.

Department of the Interior, Washington, D. C.

Nov. 4, 1930.

Approved:

Jos. M. Dixon, First Assistant Secretary.  
WWM.

[fol.62]

12627

Indexed

Dept. of Int. to Nitey

11-4-30

STATE OF OKLAHOMA,

Seminole County, ss:

I hereby certify that this instrument was filed for record in my office the 2 day of Dec. A. D. 1930 at 1 o'clock P. M. and is duly recorded in Record 441, page 49.

Ellis Cooper, County Clerk, By Thelma Seran.

Filed for record on the 7 day of August, 1931, at 9 o'clock A. M., and recorded in Book 26, page —.

A. M. Landman, Supt. for the Five Civilized Tribes,  
By Gertrude Hooton, Clerk.

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\* To be signed by the Indian, or by the Superintendent if the Indian is a minor, incompetent adult, or where the Indian fails to designate.

Department of the Interior,  
Office of Superintendent for the Five Civilized Tribes,  
Muskogee, Oklahoma

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes of Indians and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of Certificate designating lands exempt from taxation of Nitey, Seminole Fullblood Roll No. 1446.

Jan. 3, 1941.

J. T. Wilkinson, Asst. to Superintendent. (Seal.)

[fol. 63]

EXHIBIT E TO COMPLAINT

STATE OF OKLAHOMA,  
County of Muskogee, ss:

Notice of Intention to File Suit for Recovery of Taxes

To the Oklahoma Tax Commission, State of Oklahoma:

Take notice that the United States of America, acting on behalf of the Secretary of the Interior, and the estate of Nitey, deceased full-blood Seminole Indian, intends to file suit for recovery of estate and inheritance taxes paid on this date by the United States of America and the Secretary of the Interior in the sum of \$16,053.74, being the sum assessed by you as estate and inheritance taxes against said estate.

Cleon A. Summers, United States Attorney; William  
H. Landram, Assistant United States Attorney.

I acknowledge receipt of a copy of the above notice of intention of the United States of America to file suit for recovery of the estate and inheritance taxes on this Dec. 3—1940 day of December, 1940.

Oklahoma Tax Commission, by J. D. Dunn, Vice-  
Chairman.

## IN UNITED STATES DISTRICT COURT

ANSWER AND AFFIDAVIT OF SERVICE—Filed February 28, 1941

Comes now the defendant, Oklahoma Tax Commission, and, for its answer to the complaint filed herein, denies each and every material allegation therein contained, except as hereinafter specifically admitted, and demands strict proof thereof.

## I

Defendant admits the allegations contained in paragraphs numbered I, VI, VII and IX of the complaint.

## II

Defendant alleges that it is without knowledge or information [fol. 64] sufficient to form a belief as to the truth of the allegations contained in paragraphs numbered IV and VIII of the complaint.

## III

Defendant admits that Nitey was a full-blood Seminole Indian, enrolled as such opposite Seminole Roll No. 1446, and that she departed this life on or about August 17, 1930, while domiciled in and a resident in good faith of the State of Oklahoma; defendant alleges that as to the remaining allegations of paragraph numbered II of the complaint it is without knowledge or information sufficient to form a belief as to the truth thereof.

## IV

Defendant alleges that Nitey was the owner, at the time of her death, of an estate of the gross value of \$752,751.97; that said estate has been valued by the defendant for inheritance tax purposes at the net value of \$677,593.58, as of the date of Nitey's death; that said estate upon Nitey's death (August 17, 1930) passed and was transferred to her surviving husband and five children in equal shares by a will executed and probated under and pursuant to the laws of the State of Oklahoma, or according to the intestate laws (Laws of Descent and Distribution) of the State of Oklahoma; that the defendant, pursuant to the Inheritance Tax Law of the State of Oklahoma in force and effect at the time of Nitey's death, assessed inheritance tax on the transfer of

each of said shares aggregating the total sum of \$16,053.74; that each of said transfers was subject to the tax assessed; defendant alleges that said tax was paid to it by the Secretary of the Interior on the 3rd day of December, 1940, under protest; defendant admits issuance of "Exhibit A" attached to the complaint; defendant denies that it assessed the estate of Nitey an estate and inheritance tax in the amount of \$16,053.74, or in any other amount; defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that Nitey was, at the time of her death, a restricted member of the Five Civilized Tribes.

[fol. 65]

# V

Defendant denies each and every allegation contained in paragraph numbered V of the complaint; alleges that upon the death of Nitey her said estate passed, as hereinabove stated, to her surviving husband and five children in equal shares; that the transfer of each of said shares was pursuant to a will executed and probated under the laws of the State of Oklahoma, or according to the intestate laws (Laws of Descent and Distribution) of said State, subject to the Oklahoma Inheritance Tax; that said estate was subject to valuation for inheritance tax purposes under the laws of the State of Oklahoma; that the defendant, pursuant to its duty and authority under the laws of said State, determined as aforesaid the net value of said estate and fixed the same at \$677,593.58, and assessed and collected Oklahoma Inheritance Tax upon the transfer of the several shares of said estate in the aggregate sum of \$16,053.74.

Wherefore, Defendant, having fully answered the complaint filed herein, demands judgment under which plaintiff shall be denied the relief sought and under which plaintiff's action shall be dismissed, and for all of its costs in and about this matter laid out and expended.

F. M. Dudley, Attorney for Defendant. Address:  
State Capitol Building, Oklahoma City, Oklahoma.

STATE OF OKLAHOMA,  
County of Oklahoma, ss:

F. M. Dudley, of lawful age, being first duly sworn, states that he is the attorney for the Oklahoma Tax Commission, defendant in the above numbered and styled cause; that on

February 27, 1941, he served a true and correct copy of the above and foregoing answer on the plaintiff by depositing, on said date in the United States Post Office, Capitol Station, Oklahoma City, Oklahoma, a copy of said answer, in a sealed envelope addressed to Mr. Wm. H. Landram, Assistant United States Attorney, Federal Building, [fol. 66] Muskogee, Oklahoma, attorney for said plaintiff, with postage thereon fully prepaid.

F. M. Dudley.

Subscribed and sworn to before me this 27 day of February, 1941. R. R. Burnham, Notary Public.  
My commission expires: December 28, 1941.  
(Seal.)

[File endorsement omitted.]

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#### IN UNITED STATES DISTRICT COURT

#### STIPULATION AND AGREEMENT—Filed July 14, 1941

Come now the plaintiff, United States of America, by Wm. H. Landram, Assistant United States Attorney and attorney for the plaintiff, and the defendant, Oklahoma Tax Commission of the State of Oklahoma, by F. M. Dudley, attorney for the defendant, and stipulate and agree as follows:

#### 1

That the defendant, Oklahoma Tax Commission, was created by the laws of the State of Oklahoma, and, besides other things, was given the power and charged with the duty of assessing and collecting inheritance and inheritance and transfer taxes laid under the laws of the State of Oklahoma.

#### 2

That Nitey was a Seminole Indian of the full blood and was enrolled as such opposite Seminole Roll No. 1446, and that she departed this life on or about August 7, 1930, while domiciled in and a resident in good faith of the State of Oklahoma; and that said decedent was at the time of her death, and had been at all times since November 16, 1907, a



citizen of the State of Oklahoma; and that said decedent left surviving her five children, all full-blood Seminole Indians.

### 3

That there was allotted and patented to Nitey, as her homestead allotment the following described lands:

Lot One (1), (or the NE $\frac{1}{4}$  of NE $\frac{1}{4}$ ) of Section 2, Township 7 North, Range 6 East, Seminole County, Oklahoma; [fol. 67] and that there was allotted and patented to Nitey, as her surplus allotment, the following lands:

The East Half of the Southeast Quarter of Section 35, Township 8 North, Range 6 East, and the South Half of the Northeast Quarter and Lot 2 (or NW $\frac{1}{4}$  of NE $\frac{1}{4}$ ) of Section 2, Township 7 North, Range 6 East, Seminole County, Oklahoma;

That Nitey was the owner of the above described lands at the time of her death.

### 4

That the lands above described were leased during the lifetime of Nitey for oil and gas mining purposes under departmental oil and gas mining leases, approved by the Secretary of the Interior, for a period of ten years or as long thereafter as oil and gas is produced in paying quantities. Production was had under said leases from said lands in large quantities during the lifetime of said decedent, and the Secretary of the Interior received, under the provisions of said lease or leases, the royalty payments or income belonging to said decedent on account thereof; that out of such royalty payments so received by the Secretary of the Interior said Secretary purchased for Nitey United States Treasury Bonds, and at the time of decedent's death there were credited to her account, on the books of the Interior Department, United States Treasury Bonds of a total face value of \$203,812.50, and the fair market value of these bonds, with accrued interest thereon at the date of decedent's death, was \$204,693.75; that all such royalty payments received by the Secretary of the Interior in excess of the amount or amounts invested by him, as aforesaid in United States Treasury Bonds, were deposited by said Secretary, along with all other funds currently received by him on behalf of all restricted Indians, in banks to his own

account, and said Secretary gave Nitey credit therefor on the books of the Interior Department.

That at the time of Nitey's death there was credited to her account on the books of the Interior Department United States Treasury Bonds, so purchased as aforesaid by the [fol. 68] Secretary of the Interior, of the face value of \$203,812.50, with interest accrued thereon in the amount of \$881.25, and at the time of said decedent's death she had a cash credit on the books of the Interior Department, created as aforesaid, in the amount of \$513,380.22.

## 5

That Nitey was the owner at the time of her death of an estate of the gross value of \$752,751.97, consisting of the following:

U. S. Treasury Bonds credited to her account, under paragraph 4 above, .....	\$203,812.50
Interest Accrued on said Bonds .....	881.25
Cash Credit, mentioned under paragraph 4 above .....	513,380.22
E½ of SE¼ of Section 35, Twp. 8 North, Range 6 East, Seminole County, Oklahoma	32,078.00
Household goods .....	2,500.00
Truck .....	100.00
<b>Total .....</b>	<b>\$752,751.97</b>

## 6

That Nitey died testate, having executed on June 1, 1930, at her home in Seminole County, Oklahoma, a Will which was valid and duly probated in Probate Case No. 3703 in the County Court of Seminole County, Oklahoma; that Nitey's estate was transferred and passed under said Will to her five surviving children in equal shares.

That Nitey's said gross estate of the value of \$752,751.97 was valued by the defendant, Oklahoma Tax Commission, for Oklahoma inheritance tax purposes, at the net value of \$677,593.58; and that said defendant, acting pursuant to the Oklahoma Inheritance Tax Law in force at the time of Nitey's death, assessed inheritance tax on the transfer of the share of said estate passing to each of decedent's children, such tax amounting in the aggregate to \$16,053.74.

That the Secretary of the Interior, on the 3rd day of [fol. 69] December, 1940, paid to the defendant, Oklahoma Tax Commission, under protest, said sum and received therefor an official receipt of payment, which receipt is attached to the complaint, marked "Exhibit A", incorporated therein and made a part thereof.

## 7

That all of the funds, including the United States Treasury Bonds above mentioned, belonging to the decedent at the time of her death, were then and have been at all times since then, retained and supervised by the Secretary of the Interior.

## 8

That "Exhibit D", attached to and made a part of the complaint, was filed of record in the office of the County Clerk of Seminole County, Oklahoma, on December 3, 1930, in Book 441, Page 49, of the records of said County.

That if the transfer of Nitey's estate be subject to the Oklahoma inheritance tax in force and effect at the time of her death, it is agreed that the net value of said estate was \$677,593.58, as of that date; and that the inheritance tax of \$16,053.74 assessed on the transfers of said estate was and is the correct amount of tax.

## 10

That the tax so paid by the Secretary of the Interior to the defendant, Oklahoma Tax Commission, was paid under protest and at the time of making said payment the Secretary of the Interior gave notice in writing to the defendant of his intention to file suit for the recovery of said tax.

## 11

That the credits hereinabove mentioned were carried on the books of the Interior Department, kept by the Superintendent of the Five Civilized Tribes at Muskogee, Oklahoma.

## 12

Whether or not the lands, or any part thereof, described in this stipulation were restricted at the time of or subsequent to the death of decedent is a question of law upon which the parties are not agreed; however, it is agreed

that the Secretary of the Interior never at any time issued any instrument removing restrictions on said lands or any part thereof. It is further agreed that either party may introduce in evidence certified copies of the patents under which said lands were originally patented.

It Is Further Stipulated and Agreed by and between the parties hereto that each party reserves the right to introduce further testimony and evidence in support of its pleadings, which is not inconsistent with the facts herein stipulated.

Dated this 14th day of July, 1941.

United States of America, Plaintiff, William H. Landram, Assistant United States Attorney, Attorney for Plaintiff. Oklahoma Tax Commission, Defendant. F. M. Dudley, Attorney for Defendant.

[File endorsement omitted.]

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IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL STIPULATION AND AGREEMENT—Filed July 21, 1941

In addition to and supplementing the stipulation and agreement filed in the above styled case on July 14, 1941, it is stipulated and agreed that the following exhibits as numbered may be introduced by plaintiff as evidence in said case:

Exhibit No. 1—Homestead Patent of Nitey.

Exhibit No. 2—Surplus allotment patent of Nitey.

Exhibit No. 3—Oil and Gas Mining Lease upon the homestead allotment of the said Nitey.

Exhibit No. 4—Oil and Gas Mining Lease upon the surplus allotment of Nitey.

[fol. 71] That certified photostatic copies are hereto attached and numbered exhibits as aforesaid.

United States of America, Plaintiff, by William H. Landram, Assistant United States Attorney, Attorney for Plaintiff. Oklahoma Tax Commission, by F. M. Dudley, Attorney for Defendant.

The aforesaid exhibits attached hereto are admitted into evidence on the 21st day of July, 1941.

Eugene Rice, Judge.

[File endorsement omitted.]

Clerk's Note: Exhibits No. 1 and No. 2 are omitted for the reason same appear at page 57 and page 59 respectively.

IN UNITED STATES DISTRICT COURT

ORDER ADMITTING CERTAIN PATENTS AND OIL AND GAS LEASE  
INTO EVIDENCE—Filed October 11, 1941

Now on this 11th day of October, 1941, the United States of America, plaintiff herein, appeared by William H. Landram, Assistant United States Attorney for the Eastern District of Oklahoma, and reported to the court that in Part 14 of the Stipulation and Agreement filed herein by the plaintiff and the defendant, it was agreed that either party might introduce into evidence certified copies of the patents under which the lands involved herein were originally patented. The said plaintiff offers the hereinafter named certified copies of patents, certificate designating lands exempt from taxation, and oil and gas mining lease as evidence in this case.

The court finds that in accordance with the stipulation and agreement signed by the plaintiff and defendant, said certified copies of the patents should be admitted into evidence in this case.

It Is Therefore Ordered, Adjudged and Decreed by the court that the following certified copies of patents and certificate designating lands exempt from taxation be admitted into evidence:

[fol. 72] Certificate designating lands exempt from taxation—Exhibit "A";

Homestead deed Patent of Nitey;—Exhibit "B".

Surplus Allotment Deed of Nitey—Exhibit "C".

It is further ordered, adjudged and decreed that a certified copy of the Oil and Gas Mining Lease, dated the 28th day of January, 1922, signed by Nitey be introduced into evidence and marked Exhibit "D".

Eugene Rice, Judge.

O. K. F. M. Dudley, Attorney for Defendant.

O. K. William H. Landram, Attorney for Plaintiff.

[File endorsement omitted.]



(Exhibits A, B and C are omitted for the reason that same appear at page 61; page 57 and page 59 respectively.)

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## EXHIBIT D

### Oil and Gas Mining Lease Upon Land Selected for Allotment

I 27 ind 7259 Seminole Nation, Oklahoma

This Indenture of Lease, Made and entered into in quadruplicate on this 28th day of January A. D. 1922, by and between Nitey, of Seminole, Okl., enrolled as a full blood citizen of the Seminole Nation, Roll No. 1446, party of the first part, hereinafter designated as lessor, and Guy E. [fol. 73] Buchner, of Holdenville, Oklahoma, party of the second part, hereinafter designated as lessee, under and in pursuance of the provisions of the Act of Congress approved May 27, 1908, (34 Stat. L. P. 312) Witnesseth:

1. The lessor, for and in consideration of one dollar, the receipt whereof is acknowledged, and of the royalties, covenants, stipulations and conditions hereinafter contained, and hereby agreed to be paid, observed and performed by the lessee, does hereby demise, grant, lease, and let unto the lessee, for the term of ten years from the date of the approval hereof by the Secretary of the Interior, and as much longer thereafter as oil or gas is found in paying quantities, all the oil deposits and natural gas in or under the following described tract of land, lying and being within the county of Seminole and State of Oklahoma, to-wit: The Northeast (NE4) Quarter of of Section 2, Township 7 N, Range 6E of the Indian Meridian, and containing 160 acres, more or less, with the exclusive right to prospect for, extract, pipe, store and remove oil and natural gas, and to occupy and use so much, only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing, and removing such oil and natural gas, also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, and also the right to use, free of cost, oil and natural gas as fuel so far as necessary to the development and operation of said property.



## Royalty No. 62684

2. The lessee hereby agrees to pay or cause to be paid to the Superintendent of the Five Civilized Tribes, Muskogee, Oklahoma, for the lessor, as royalty, the sum of 12½ per cent of the gross proceeds of all crude oil extracted from the said land, such payment to be made at the time of sale or removal of the oil. And the lessee shall pay as royalty on each gas producing well three hundred dollars per annum in advance, to be calculated from the date of [fol. 74] commencement of utilization: Provided, however, in the case of gas wells of small volume, when the rock pressure is one hundred pounds or less, the parties hereto may, subject to the approval of the Secretary of the Interior, agree upon a royalty, which will become effective as a part of this lease; Provided, further, That in case of gas wells of small volume, or where the wells produce both oil and gas or oil and gas and salt water to such extent that the gas is unfit for ordinary domestic purposes, or where the gas from any well is desired for temporary use in connection with drilling and pumping operations on adjacent or nearby tracts, the lessee shall have the option of paying royalties upon such gas wells of the same percentage of the gross proceeds from the sale of gas from such wells as is paid under this lease for royalty on oil. The lessor shall have the free use of gas for domestic purposes in his residence on the leased premises, provided there shall be surplus gas produced on said premises over and above enough to fully operate the same. Failure on the part of the lessee to use a gas producing well, which cannot profitably be utilized at the rate herein prescribed, shall not work a forfeiture of this lease so far as the same relates to mining oil, but if the lessee desires to retain gas producing privileges, the lessee shall pay a rental of one hundred dollars per annum, in advance, calculated from date of discovery of gas, on each gas producing well, gas from which is not marketed or not utilized otherwise than for operations under this lease. Payments of annual gas royalties shall be made within twenty-five days from the date such royalties become due, other royalty payments to be made monthly on or before the 25th day of the month succeeding that for which such payment is to be made, supported by sworn statements.

3. Until a producing well is completed on said premises the lessee shall pay, or cause to be paid, to said Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, for lessor, as advanced annual royalty, from the date of the approval of this lease, fifteen cents per acre per annum, annually, in advance for the first and second years; thirty cents per acre per annum, annually, in advance, for the third and fourth years; seventy-five cents per acre per annum, annually, in advance, for the fifth year; and one dollar per acre per annum, annually, in advance, for each succeeding year of the term of this lease; it being understood and agreed that such sums of money so paid shall be a credit on stipulated royalties, and the lessee hereby agrees that said advance royalty when paid shall not be refunded to the lessee because of any subsequent surrender or cancellation thereof; nor shall the lessee be relieved from its obligation to pay said advance royalty annually when it becomes due, by reason of any subsequent surrender or cancellation of this lease.

4. The lessee shall exercise diligence in sinking wells for oil and natural gas on land covered by this lease and shall drill at least one well thereon within one year from the date of approval of this lease by the Secretary of the Interior, or shall pay to said Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, for the use and benefit of the lessor, for each whole year the completion of such well is delayed after the date of such approval by the Secretary of the Interior, for not to exceed ten years from the date of such approval, in addition to the other considerations named herein, a rental of one dollar per acre, payable annually; and if the lessee shall fail to drill at least one well within any such yearly period and shall fail to surrender this lease by executing and recording a proper release thereof and otherwise complying with paragraph numbered 7 hereof on or before the end of any such year during which the completion of such well is delayed, such failure shall be taken and held as conclusively evidencing the election and covenant of the lessee to pay the rental of one dollar per acre for such year and thereupon the lessee shall be absolutely obligated to pay such rental. The failure of the lessee to pay such rental before the expiration of fifteen days after it becomes due at the end of any yearly period, during which a well has not been completed as provided herein, shall be a

violation of one of the material and substantial terms and conditions of this lease, and be cause for cancellation of such lease under paragraph numbered 9 hereof; but such cancellation shall not in any wise operate to release or relieve the lessee from the covenant and obligations to pay [fol. 76] such rental, or any other accrued obligation. The lessee may be required by the Secretary of the Interior, or by such officer as may be designated by him for the purpose to drill and operate wells to offset wells on adjoining tracts, and within three hundred feet of the dividing line, or in case of gas wells lessee may have the option, in lieu of drilling offset wells, of paying a sum equal to the royalties which would accrue on each well to be offset if said wells had been drilled and were being operated on the land described herein and in accordance with the terms hereof. It is understood and agreed by the parties hereto that offset wells shall be drilled or royalty paid in lieu of drilling, within ten days after the lessee is notified to do so, and failure to comply with such requirements shall constitute a violation of one of the substantial terms of this lease.

5. The lessee shall carry on development and operations in a workmanlike manner, commit no waste on the said land and suffer none to be committed upon the portion in his occupancy or use, take good care of the same and promptly surrender and return the premises upon the termination of this lease to lessor or to whomsoever shall be lawfully entitled thereto, unavoidable casualties excepted; shall not remove therefrom any buildings or permanent improvements erected thereon during the said term by the said lessee, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, excepting tools, derricks, boiler, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines and machinery, and the casing of all dry or exhausted wells which shall remain the property of the lessee, and may be removed at any time prior to sixty days after the termination of the lease by forfeiture or otherwise; and shall not permit any nuisance to be maintained on the premises under lessee's control nor allow any intoxicating liquors to be sold or given away for any purposes on such premises; shall not use such premises for any other purpose than those authorized in the lease; and before abandoning any well shall securely plug the

same so as effectually to shut off all water from the oil-bearing stratum, or in the manner required by the laws of the State of Oklahoma.

[fol. 77] 6. The lessee shall keep an accurate account of all oil-mining operations, showing the sales, prices, dates, purchases, and the whole amount of oil mined or removed; and all sums due as royalty shall be a lien on all implements, tools, movable machinery, and all other personal chattels used in operating said property and also upon all of the unsold oil obtained from the land herein leased, as security for payment of said royalty.

7. The lessee may at any time, by paying to the Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, all amounts then due as provided herein and the further sum of one dollar, surrender and cancel this lease and be relieved from all further obligations or liability thereunder; Provided, if this lease has been recorded lessee shall execute a release and record the same in the proper county recording office: Provided, further, in event restrictions are removed from all leased premises, the lessee may surrender all the undeveloped portion thereof by paying the lessor all amounts then due and the further sum of one dollar, which surrender shall not affect the terms hereof as to each producing well and ten acres of said premises as nearly in square form as possible next contiguous to and surrounding each of said wells, and execute and record a cancellation of premises surrendered.

8. This lease shall be subject to the regulations of the Secretary of the Interior, now or hereafter in force, relative to such leases, all of which regulations are made a part and condition of this lease: Provided, however, that no regulations made after the approval of this lease, affecting either the length of term of oil and gas leases, the rates of royalty or payment thereunder, of the assignment of leases, shall operate to affect the terms and conditions of this lease.

9. Upon the violation of any of the substantial terms and conditions of this lease the Secretary of the Interior (or lessor, in event restrictions are removed as provided in paragraph 12 hereof) shall have the right at any time after thirty days' notice to the lessee specifying the terms or conditions violated, to declare this lease null and void, and

[fol. 78] the lessor shall then be entitled and authorized to take immediate possession of the land.

10. Before this lease shall be in force and effect the lessee shall furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior and such further bond or bonds as may be required by said Secretary, conditioned for the performance of this lease, which bond shall be deposited and remain on file in the Indian office.

11. Assignment of this lease or any interest therein may be made with the approval of the Secretary of the Interior, it being understood that to secure such approval the proposed assignee need only be qualified to hold such a lease under the rules and regulations, and furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, conditioned for the faithful performance of the covenants and conditions of this lease.

12. In event restrictions on alienation shall be removed from all the leasehold premises described above, this lease shall be released from the supervision of the Secretary of the Interior, such release to take effect without further agreement, from the date such restrictions are removed, and thereupon the authority and power delegated to the Secretary of the Interior as herein provided shall cease, and all payments required to be made to said Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, shall thereafter be made to lessor or the then owner of said lands in person or be deposited to the credit of said lessor or his assigns at the First National Bank of Seminole, Okla., or such other place as the said lessor or his assigns may from time to time designate in writing, and changes in regulations thereafter made by the Secretary of the Interior applicable to oil and gas leases shall not apply to this lease.

13. Each and every clause and covenant in this indenture shall extend to the heirs, executors, administrators, successors, and lawful assigns of the parties hereto.

14. In Witness Whereof, the said parties have hereunto [fol. 79] subscribed their names and affixed their seals on the day and year first above mentioned.

Nitey, (Seal) her (thumb print) mark, Guy M. Buchner, (Seal) — — —, (Seal).

Attest: — — —.



Two witnesses to execution by lessor:

P. J. Narcomey, P. O. Holdenville, Okla.

H. A. Archerd, Field Clerk, P. O. Holdenville, Okla.

Two witnesses to execution by lessee:

Ralph S. Welch, P. O. Holdenville, Oklahoma.

Arthur Bruner, P. O. Holdenville, Oklahoma.

STATE OF OKLAHOMA,

County of Hughes, ss:

Before me, a Notary Public, in and for said county and state, on this 28th day of January, 1922, personally appeared Nitey, to me known to be the identical person— who executed the within and foregoing lease, by her mark, in my presence and in the presence of H. A. Archerd and P. J. Narcomey, as witnesses, and acknowledged to me that she executed the same as her free and voluntary act and deed for the uses and purposes therein set forth.

James W. Rodgers, Notary Public.

(My commission expires April 16, 1925.)

Department of the Interior, Office of the Superintendent for the Five Civilized Tribes, Muskogee, Okla., Mar. 21, 1922.

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be Approved. See my report of even date.

[fol. 80] Clark Wasson, Acting Superintendent for the Five Civilized Tribes.

Department of the Interior, Office of Indian Affairs, Washington, D. C., (illegible) 1922.

Respectfully submitted to the Secretary of the Interior, with recommendation that it be Approved.

E. B. Meritt, Assistant Commissioner.

Royalty 62684

Department of the Interior, Washington, D. C., Mar. 31, 1922. Approved.

F. M. Goodwin, Assistant Secretary of the Interior.



Filed in the office of the Superintendant for the Five Civilized Tribes this 25 day of February, 1922, at 9:45 o'clock a. m.

Victor M. Looke, Jr., Superintendent, by J. C. Madden.

Advance Royalty Received, \$24.00.

Bonus 80.00.

Ent. 6/1/23  
5-154r

Lease No. 45164  
May 4-1923.

Department of the Interior, Washington, D. C.

The assignment of this lease by Guy M. Buchner, of all his interest in so far as it covers the N/2 of NE/4; SW/4 of NE/4 Sec. 2, T. 7 N., R. 6 East, to Indian Territory Illuminating Oil Company, is Approved, effective only from date of approval, subject to the orders and regulations of this Department now existing or hereafter to be promulgated. The price basis for computation of royalty on oil shall be the market price as ascertained and declared by the Secretary of the Interior, and the royalty shall be 12½ per cent on such price basis.

Hubert Work, Secretary.

Department of the Interior

Office of Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of Oil and Gas Mining Lease by and between Nitey and Guy M. Buchner dated January 28, 1922.

J. F. Wilkinson, Ass't to Superintendent (Seal.)

Jul. 15, 1941.

**OIL AND GAS MINING LEASE UPON LAND SELECTED FOR ALLOT-  
MENT**

**Seminole Nation, Oklahoma**

This Indenture of Lease, made and entered into in quadruplicate on this 28th day of January, A. D. 1922, by and between Nitey, of Seminole, Okla., enrolled as a full-blood citizen of the Seminole Nation, Roll No. 1446, party of the [fol. 82] first part, hereinafter designated as lessor, and Gladys Belle Oil Company, of Tulsa, Oklahoma, party of the second part, hereinafter designated as lessee, under and in pursuance of the provisions of the Act of Congress approved May 27, 1908, (35 Stat. L. P. 312) Witnesseth:

1. The lessor, for and in consideration of one dollar, the receipt whereof is acknowledged, and of the royalties, covenants, stipulations and conditions hereinafter contained, and hereby agreed to be paid, observed and performed by the lessee, does hereby demise, grant, lease, and let unto the lessee, for the term of ten years from the date of the approval hereof by the Secretary of the Interior, and as much longer thereafter as oil or gas is found in paying quantities, all the oil deposits and natural gas in or under the following described tract of land, lying and being within the county of Seminole, and State of Oklahoma, to-wit: The East Half (E2) of Southeast (SE4) Quarter, 6% of Section 35, Township 8N, Range 6E of the Indian Meridian, and containing 80 acres, more or less, with the exclusive right to prospect for, extract, pipe, store and remove oil and natural gas, and to occupy and use so much, only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing and removing such oil and natural gas, also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, and also the right to use, free of cost, oil and natural gas as fuel so far as necessary to the development and operation of said property.

2. The lessee hereby agrees to pay or cause to be paid to the Superintendent of the Five Civilized Tribes, Muskogee, Oklahoma, for the lessor, as royalty, the sum of 12½ per cent. of the gross proceeds of all crude oil extracted from the said land, such payment to be made at the time of sale

or removal of the oil. And the lessee shall pay as royalty on each gas producing well three hundred dollars per annum in advance, to be calculated from the date of commencement of utilization: Provided, however, in the case of gas wells of small volume, when the rock pressure is one hundred pounds or less, the parties hereto may, subject to [fol. 83] the approval of the Secretary of the Interior, agree upon a royalty, which will become effective as a part of this lease; Provided, Further, That in case of gas wells of small volume, or where the wells produce both oil and gas or oil and gas and salt water to such extent that the gas is unfit for ordinary domestic purposes, or where the gas from any well is desired for temporary use in connection with drilling and pumping operations on adjacent or nearby tracts, the lessee shall have the option of paying royalties upon such gas wells of the same percentage of the gross proceeds from the sale of gas from such wells as is paid under this lease for royalty on oil. The lessor shall have the free use of gas for domestic purposes in his residence on the leased premises, provided there shall be surplus gas produced on said premises over and above enough to fully operate the same. Failure on the part of the lessee to use a gas producing well, which cannot profitably be utilized at the rate herein prescribed, shall not work a forfeiture of this lease so far as the same relates to mining oil, but if the lessee desires to retain gas producing privileges, the lessee shall pay a rental of one hundred dollars per annum, in advance, calculated from date of discovery of gas, on each gas producing well, gas from which is not marketed or not utilized otherwise than for operations under this lease. Payments of annual gas royalties shall be made within twenty-five days from the date such royalties become due, other royalty payments to be made monthly on or before the 25th day of the month succeeding that for which such payment is to be made, supported by sworn statements.

3. Until a producing well is completed on said premises the lessee shall pay, or cause to be paid, to said Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, for lessor, as advanced annual royalty, from the date of the approval of this lease, fifteen cents per acre per annum, annually, in advance for the first and second years; thirty cents per acre per annum, annually, in advance, for the third and fourth years; seventy-five cents per acre per

annum annually, in advance, for the fifth year; and one dollar per acre per annum, annually, in advance, for each [fol. 84] succeeding year of the term of this lease; it being understood and agreed that such sums of money so paid shall be a credit on stipulated royalties, and the lessee hereby agrees that said advance royalty when paid shall not be refunded to the lessee because of any subsequent surrender or cancellation thereof; nor shall the lessee be relieved from its obligation to pay said advance royalty annually when it becomes due, by reason of any subsequent surrender or cancellation of this lease.

4. The lessee shall exercise diligence in sinking wells for oil and natural gas on land covered by this lease and shall drill at least one well thereon within one year from the date of approval of this lease by the Secretary of the Interior, or shall pay to said Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, for the use and benefit of the lessor, for each whole year the completion of such well is delayed after the date of such approval by the Secretary of the Interior, for not to exceed ten years from the date of such approval, in addition to the other considerations named herein, a rental of one dollar per acre, payable annually; and if the lessee shall fail to drill at least one well within any such yearly period and shall fail to surrender this lease by executing and recording a proper release thereof and otherwise complying with paragraph numbered 7 hereof on or before the end of any such year during which the completion of such well is delayed, such failure shall be taken and held as conclusively evidencing the election and covenant of the lessee to pay the rental of one dollar per acre for such year and thereupon the lessee shall be absolutely obligated to pay such rental. The failure of the lessee to pay such rental before the expiration of fifteen days after it becomes due at the end of any yearly period, during which a well has not been completed as provided herein, shall be a violation of one of the material and substantial terms and conditions of this lease, and be cause for cancellation of such lease under paragraph numbered 9 hereof; but such cancellation shall not in any wise operate to release or relieve the lessee from the covenant and obligations to pay such rental, or any other accrued obligation. The lessee may be required by the Secretary of the Interior, [fol. 85] or by such officer as may be designated by him for

the purpose to drill and operate wells to offset wells on adjoining tracts, and within three hundred feet of the dividing line, or in case of gas wells lessee may have the option, in lieu of drilling offset wells, of paying a sum equal to the royalties which would accrue on each well to be offset if said wells had been drilled and were being operated on the land described herein and in accordance with the terms hereof. It is understood and agreed by the parties hereto that offset wells shall be drilled or royalty paid in lieu of drilling, within ten days after the lessee is notified to do so, and failure to comply with such requirements shall constitute a violation of one of the substantial terms of this lease.

5. The lessee shall carry on development and operations in a workmanlike manner, commit no waste on the said land and suffer none to be committed upon the portion in his occupancy or use, take good care of the same and promptly surrender and return the premises upon the termination of this lease to lessor or to whosoever shall be lawfully entitled thereto, unavoidable casualties excepted; shall not remove therefrom any buildings or permanent improvements erected thereon during the said term by the said lessee, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, excepting tools, derricks, boiler, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines and machinery, and the casing of all dry or exhausted wells which shall remain the property of the lessee, and may be removed at any time prior to sixty days after the termination of the lease by forfeiture or otherwise; and shall not permit any nuisance to be maintained on the premises under lessee's control nor allow any intoxicating liquors to be sold or given away for any purposes on such premises; shall not use such premises for any other purpose than those authorized in the lease; and before abandoning any well shall securely plug the same so as effectually to shut off all water from the oil-bearing stratum, or in the manner required by the laws of the State of Oklahoma.

6. The lessee shall keep an accurate account of all oil- [fol. 86] mining operations, showing the sales, prices, dates, purchases, and the whole amount of oil mined or removed; and all sums due as royalty shall be a lien on all implements,



tools, movable machinery, and all other personal chattels used in operating said property and also upon all of the unsold oil obtained from the land herein leased, as security for payment of said royalty.

7. The lessee may at any time, by paying to the Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, all amounts then due as provided herein and the further sum of one dollar, surrender and cancel this lease and be relieved from all further obligations or liability thereunder: Provided, if this lease has been recorded lessee shall execute a release and record the same in the proper county recording office: Provided, Further, in event restrictions are removed from all leased premises, the lessee may surrender all the undeveloped portion thereof by paying the lessor all amounts then due and the further sum of one dollar, which surrender shall not affect the terms hereof as to each producing well and ten acres of said premises as nearly in square form as possible next contiguous to and surrounding each of said wells, and execute and record a cancellation of premises surrendered.

8. This lease shall be subject to the regulations of the Secretary of the Interior, now or hereafter in force, relative to such leases, all of which regulations are made a part and condition of this lease: Provided, However, that no regulations made after the approval of this lease, affecting either the length of term of oil and gas leases, the rates of royalty or payment thereunder, of the assignment of leases, shall operate to affect the terms and conditions of this lease.

9. Upon the violation of any of the substantial terms and conditions of this lease the Secretary of the Interior (or lessor, in event restrictions are removed as provided in paragraph 12 hereof) shall have the right at any time after thirty days' notice to the lessee specifying the terms or conditions violated, to declare this lease null and void, and the [fol. 87] lessor shall then be entitled and authorized to take immediate possession of the land.

10. Before this lease shall be in force and effect the lessee shall furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, and such further bond or bonds as may be required by said Secretary, conditioned for the performance of this lease, which bond shall be deposited and remain on file in the Indian office.



11. Assignment of this lease or any interest therein may be made with the approval of the Secretary of the Interior, it being understood that to secure such approval the proposed assignee need only be qualified to hold such a lease under the rules and regulations, and furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, conditioned for the faithful performance of the covenants and conditions of this lease.

12. In event restrictions on alienation shall be removed from all the leasehold premises described above, this lease shall be released from the supervision of the Secretary of the Interior, such release to take effect without further agreement, from the date such restrictions are removed, and thereupon the authority and power delegated to the Secretary of the Interior as herein provided shall cease, and all payments required to be made to said Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, shall thereafter be made to lessor or the then owner of said lands in person or be deposited to the credit of said lessor or his assigns at the First National Bank of Seminole, Okla., or such other place as the said lessor or his assigns may from time to time designate in writing, and changes in regulations thereafter made by the Secretary of the Interior applicable to oil and gas leases shall not apply to this lease.

13. Each and every clause and covenant in this indenture shall extend to the heirs, executors, administrators, successors, and lawful assigns of the parties hereto.

14. In Witness Whereof, the said parties have hereunto [fol. 88] subscribed their names and affixed their seals on the day and year first above mentioned.

Nity, (Seal.) (Imprint of Thumb.) √ Gladys Belle  
Oil Company, (Seal), by G. C. Stebbins, President.

Attest: C. B. Coon, Secretary.

Attest: — — —.

Two witnesses to execution by lessor: P. J. Narcomey, P. O. Holdenville, Okla. H. A. Archerd, Field Clerk, P. O. Holdenville, Okla.

Two witnesses to execution by lessee: Rene Gilbert, P. O. Tulsa, Oklahoma. F. A. Peek, P. O. Tulsa, Oklahoma.

STATE OF OKLAHOMA,  
County of Hughes, ss :

— before me, a Notary Public, in and for said county and state, on this 28th day of January, 1922, personally appeared Nitey, to me known to be the identical person— who executed the within and foregoing lease, by her mark, in my presence and in the presence of H. A. Archerd, and P. J. Narcomey, as witnesses, and acknowledged to me that she executed the same as her free and voluntary act and deed for the uses and purposes therein set forth.

James W. Rogers, Notary Public. (My commission expires April 16, 1925.)

Department of the Interior

Office of the Superintendent for the Five Civilized Tribes

Muskogee, Okla., Mar. 8, 1922.

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be Approved. See my report of even date.

Clark Wasson, Superintendent.

Department of the Interior,

Office of Indian Affairs,

Washington, D. C., Mar. 16, 1922.

Respectfully submitted to the Secretary of the Interior, with recommendation that it be Approved.

E. B. Meritt, Assistant Commissioner.

Department of the Interior

Washington, D. C., Mar. 18, 1922.

Approved. F. M. Goodwin, Assistant Secretary of the Interior.

Filed in the office of the Superintendent for the Five Civilized Tribes this 1 day of February, 1922, at 1 o'clock P. M.

Victor M. Locke, Jr., Superintendent, by J. C. Madden.

Advance Royalty Received, \$12.00

Bonus 40.00

## Duplicate

Surplus

40588 can

27042 can

Land described herein was regularly allotted as — to Nitey✓, who is 39 years, a F Full-blood Seminole, Roll No. 1446.

M. W. (illegible).

Date Feb. 3-22.

Department of the Interior

Office of

Superintendent for the Five Civilized Tribes

Muskogee, Oklahoma

This is to certify that I am the officer having custody of [fol. 90] the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of Oil and Gas Mining lease dated January 28, 1922 by and between Nitey and Gladys Belle Oil Company.

J. T. Wilkinson, Asst. to Superintendent. (Seal.)

May 6, 1942.

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 IN UNITED STATES DISTRICT COURT

**Findings of Fact and Conclusions of Law**—Filed December 22, 1941

This action was instituted by the United States for itself and in behalf of the estate of Nitey, deceased full-blood Seminole Indian, to recover the sum of \$16,053.74, with interest, representing the amount assessed by the Oklahoma Tax Commission as an inheritance tax upon the transfer of the estate of said Nitey, who died testate August 17, 1930. The tax was paid under protest by the Secretary of the Interior and the United States, and this action is to recover same pursuant to the provisions of 38 Okl. Stat. Ann., Sec. 1475.

The cause was tried before the court and submitted upon written briefs of the parties. The material facts were stipulated.

### FINDINGS OF FACT

The facts as stipulated were reduced to writing, signed by the parties and filed herein. The court finds the facts to be as stipulated. Briefly summarized the essential facts for determination of this cause are as follows:

#### I

Nitey was a full-blood Seminole Indian, enrolled as such opposite Seminole Roll No. 1446. She died August 17, 1930, while domiciled in and a resident in good faith of the State of Oklahoma. Nitey left a will which was duly probated and under which her estate was transferred to her five surviving full-blood Seminole children in equal shares.

[fol. 91]

#### II

Nitey died seized of the following estate:

##### Real Property:

Her homestead allotment consisting of 40 acres,  
Her surplus allotment consisting of 200 acres,

##### Personal Property:

U. S. Treasury Bonds purchased for her account out of proceeds from the sale of oil and gas produced from her allotted lands,

Cash credit on the books of the Interior Department representing proceeds from the sale of said oil and gas (both the bonds and the cash were in the custody of and in the control of the Secretary of the Interior at the time of the death of Nitey.)

Household goods and a truck valued in the aggregate at \$2,600.00.

The gross value of said estate was \$752,751.97, which was valued by the Oklahoma Tax Commission for Oklahoma inheritance tax purposes at the net value of \$677,593.58.

#### III

A certificate designating 160 acres of Nitey's lands (being her homestead and 120 acres of her surplus allotment) as

tax-exempt was filed for record in the office of the County Clerk of Seminole County, Oklahoma, on December 3, 1930.

#### IV

The Secretary of the Interior, never at any time issued any instrument removing restrictions on said lands or any part thereof; and all of the funds, including the United States Treasury bonds, belonging to decedent at the time of her death, were then and have been at all times since then, retained under the supervision and control of the Secretary of the Interior and the credits therefor were carried upon the books of said department, kept by the Superintendent for the Five Civilized Tribes at Muskogee, Oklahoma.

[fol. 92]

#### V

The Defendant Oklahoma Tax Commission, acting pursuant to the Oklahoma Inheritance Tax Law in force at the time of Nitey's death, assessed an inheritance tax upon the transfer of said estate in the sum of \$16,053.74, which is the correct amount of tax if said transfer is taxable in its entirety.

#### VI

On December 3, 1940, the Secretary of the Interior paid said tax to the defendant, under written protest; and at such time the Secretary gave notice in writing to the defendant of his intention to file suit for the recovery of said tax.

### CONCLUSIONS OF LAW

#### I

This is a suit of a civil nature, brought by the United States, of which this court has original jurisdiction. 28 U. S. C. A. Sec. 41 (1).

#### II

All of the real property was restricted during Nitey's life and is restricted in the hands of her devisees. One hundred sixty acres of her land was tax-exempt, and is tax-exempt in the hands of her devisees. The income from her allotted lands and the personal property in the custody and

control of the Secretary of the Interior was restricted during Nitey's life, and is restricted in the hands of her legatees. Secs. 1 and 8, Act of January 27, 1933 (47 Stat. 777); Sec. 9, Act of May 27, 1908 (35 Stat. 315) as amended by Sec. 1, Act of April 12, 1926 (44 Stat. 239); Sec. 2, Act of May 10, 1928 (45 Stat. 495); *Glenn v. Lewis*, 105 F. (2d) 398.

### III

The applicable Oklahoma Law provides as follows:

"A tax is hereby laid upon the transfer to persons \* \* \* of property \* \* \*."

When the transfer is of tangible property in this State [fol. 93] made by any person, or of intangible property made by a resident of this State at the time of transfer:

First: By will or the intestate laws of this State; \* \* \*."

Chap. 162, S. L. Okl., 1915, as amended by Chap. 112, S. L. Okl., 1927, and found in Secs. 12469 et seq., Okl. Stat. 1931.

### IV

An inheritance tax or transfer tax such as is provided by the Oklahoma Law is not levied on the property of which the estate is composed. It is an excise tax upon the shifting of economic benefits, on the privilege of transfering property at death, on the transitus of the property from the dead to the living, *United States Trust Co. v. Helvering*, 307 U. S. 57; *United States v. Perkins*, 163 U. S. 625, *McGannon v. State*, 33 Okl. 145, 124 P. 1063; *Knowlton v. Moore*, 178 U. S. 41; *Landman v. Commissioner of Internal Revenue*, (C. C. A. 10th) 123 F. (2d) —, decided November 11, 1941, and cases cited therein.

### V

This case is primarily concerned with the question of whether or not a transfer or inheritance tax may be levied by the State of Oklahoma upon the estate of a full-blood Indian which estate consisted principally of restricted property, restricted in the hands of the decedent and in the hands of the heirs. A tax upon the transfer of property is valid even though the property is restricted and tax-exempt. *Plumber v. Coler*, 178 U. S. 115; *Orr v. Gilman*, 183 U. S.



278; *United States Trust Co. v. Helvering*, *supra*. The transfer of the restricted estate of a full-blood restricted member of one of the Five Civilized Tribes is subject to the Federal Estate Tax. Such an estate is not deemed exempt from a transfer tax upon the ground that it is a Federal instrumentality. It is not deemed a Federal instrumentality. *Landman v. Commissioner of Internal Revenue*, *supra*, and cases cited therein.

## VI

The estate herein passes under the laws of the State of Oklahoma. Members of the Five Civilized Tribes are citizens of the State of Oklahoma, *Bolen v. Nebraska*, 176 U. S. 831; *Hickman v. United States*, 224 U. S. 413. As to the members of the Five Civilized Tribes it has been the policy of Congress to subject the estates of members of said tribes to the control of the local laws of wills and succession. Sec. 23, of the Act of April 26, 1906 (34 Stat. 137), as amended; Sec. 9, Act of May 27, 1908 (35 Stat. 312), as amended; *Blundell v. Wallace*, 267 U. S. 373, *Jackson v. Harris* (C. C. A. 10th), 43 F. (2d) 513; *Jefferson v. Fink*, 247 U. S. 288; *Dunn v. Micco* (C. C. A. 10th), 106 F. (2d) 356.

## VII

Congress has the power to control the devolution of the estates of members of the Five Civilized Tribes. The State of Oklahoma concedes that Congress has this power, but contends that Congress has seen fit, by its various acts, to make applicable the laws of the State of Oklahoma to the devolution of the estates of the members of the Five Civilized Tribes. The construction of these acts of Congress and a consideration of whether or not the laws of Congress or the laws of the State of Oklahoma control the devolution of the estates of members of the Five Civilized Tribes is a Federal question and the decisions of the Federal Courts are controlling. The Federal decisions, both of the Circuit Court, and the Supreme Court in *Blundell v. Wallace*, *supra*, seem to settle this question in favor of defendant's contention. *Childers v. Beaver*, 270 U. S. 555, and *Blanset v. Cardin*, 256 U. S. 319, relied upon by the Government, involved the estate of a Quapaw Indian and a construction of the Act of June 25, 1910 (36 Stat. 855), applicable to the Quapaw Indians. This act of Congress,

Sec. 33 provides: "That the provisions of this Act shall not apply to the Osage Indians, nor to the Five Civilized Tribes, in Oklahoma, \* \* \*."

### VIII

The estate in question passed under the laws of the State of Oklahoma, and the transfer of said estate is subject to the tax provided in Chap. 162, S. L. Okl., 1915, as amended by Chap. 112, S. L. Okl., 1927, and found in Secs. 12469 et seq., Okl. Stat. 1931. The Government cannot recover the tax [fol. 95] that has been paid to the State of Oklahoma. Judgment is for the Defendant.

The attorney for the defendant will prepare proper decree to be submitted to attorneys for plaintiff and to the Court for approval and entry of judgment on the thirtieth day of December, 1941.

Dated this 22 day of December, 1941.

Eugene Rice, District Judge.

[File endorsement omitted.]

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### UNITED STATES DISTRICT COURT

### JUDGMENT—December 30, 1941

Now on this 30th day of December, 1941, there came on for entry of judgment the above numbered and entitled cause, pursuant to regular assignment and as directed by the Court; the plaintiff United States of America, appeared by Cleon A. Summers, United States Attorney, and William H. Landram, Assistant United States Attorney for the Eastern District of Oklahoma, and the defendant appeared by F. M. Dudley, Attorney for the Oklahoma Tax Commission of the State of Oklahoma, and no other appearances were made. The Court finds that heretofore the parties have entered into a written stipulation of facts and filed the same in said cause and that no other testimony was introduced.

The Court further finds that both parties waived trial by jury and filed in said cause briefs and submitted said case on said briefs and stipulation of facts to the Court; the Court, after having considered the facts and briefs of both

plaintiff and defendant, filed in said cause on the 22nd day of December, 1941, Findings of Fact and Conclusions of Law.

It Is Therefore Ordered, Adjudged and Decreed by the Court that according to the Findings of Fact and Conclusions of Law filed herein, the defendant, Oklahoma Tax Commission of the State of Oklahoma, have judgment in its favor and judgment is therefore rendered for the defendant, Oklahoma Tax Commission of the State of Oklahoma, and [fol. 96] it is adjudged that the defendant go hence without day; defendant to pay costs.

Dated this 30th day of December, 1941.

Eugene Rice, District Judge.

OK as to Form:

Cleon A. Summers, William H. Landram, Attorneys  
for Plaintiff. F. M. Dudley, Attorney for De-  
fendant.

[File endorsement omitted.]

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### IN UNITED STATES DISTRICT COURT

#### NOTICE OF APPEAL—Filed March 28, 1942

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit from the final judgment entered in this action on December 30, 1941.

United States of America, By: William H. Landram,  
Assistant United States Attorney, Attorney for  
Appellant, Federal Building, Muskogee, Oklahoma.

#### Notice of the Filing of Notice of Appeal

To F. M. Dudley, Attorney for Oklahoma Tax Commission, State Capitol Building, Oklahoma City, Oklahoma:

Please take notice that the United States of America filed in the above styled case on the 28th day of March, 1942, a notice of appeal to the United States Circuit Court of Appeals for the Tenth Circuit.

Dated this 28th day of March, 1942.

John H. Pugh, Clerk U. S. District Court for the  
Eastern District of Oklahoma, By: Broadus Mar-  
tin, Deputy.

[fol. 97] STATE OF OKLAHOMA,  
County of Muskogee, ss:

The undersigned, of lawful age, being first duly sworn upon his oath, deposes and states:

That on the 28th day of March, 1942, he enclosed a copy of the above and foregoing notice of appeal and notice of the filing of the notice of appeal in an envelope addressed to F. M. Dudley, Attorney, Oklahoma Tax Commission, State Capitol Building, Oklahoma City, Oklahoma, and after securely sealing said envelope affiant states that he deposited it in the United States Post Office at Muskogee, Oklahoma, on the date aforesaid, and being United States Government mail required no postage.

John H. Pugh, Clerk, U. S. District Court for the Eastern District of Oklahoma, By Broaddus Martin, Deputy.

Subscribed and sworn to before me this 28th day of March, 1942. Eugene Wheeler, Notary Public.  
My commission expires: 9-4-44. (Seal.)

I acknowledge receipt of a copy of the Notice of Appeal from William H. Landram, Assistant United States Attorney for the Eastern District of Oklahoma, attorney for the plaintiff herein.

F. M. Dudley, Attorney for Defendant, Oklahoma Tax Commission.

[File endorsement omitted.]

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#### IN UNITED STATES DISTRICT COURT

STIPULATION DESIGNATING PARTS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE INCLUDED IN THE RECORD ON APPEAL—Filed May 5, 1942

It is stipulated and agreed by and between the plaintiff, United States of America, by William H. Landram, Assistant United States Attorney for the Eastern District of Oklahoma, and the defendant, Oklahoma Tax Commission, by A. Francis Porta, attorney for said

defendant, that the record on appeal in the above numbered and entitled cause shall include the following:

1. Complaint and exhibits of plaintiff.
2. Answer of Defendant.
3. Stipulation and agreement filed herein on July 15, 1941.
4. Order directing that exhibits attached to stipulation and agreement be admitted into evidence.
5. Order admitting certain patents and oil and gas lease into evidence.
6. Findings of fact and conclusions of law.
7. Judgment.
8. Statement of points on which plaintiff intends to rely on appeal.
9. Stipulation designating parts of the record, proceedings and evidence to be included in the record on appeal.
10. Order Extending the time for filing the Record on Appeal and Docketing the Action.
11. Notice of Appeal.

Said stipulation and agreement is entered into by authority of Rule 75 (f) Rules of Civil Procedure for the District Court of the United States.

United States of America, Plaintiff, By William H. Landram, Assistant United States Attorney for Plaintiff. Oklahoma Tax Commission, Defendant, By A. Francis Porta, Attorney for Defendant.

[File endorsement omitted.]

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[fols. 99-102] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING THE TIME FOR FILING THE RECORD ON APPEAL AND DOCKETING THE ACTION—Filed May 2, 1942

Now on this 2nd day of May, 1942, for good cause shown, it is ordered that the time for filing the record on appeal and

docketing the action is extended for a period of thirty (30) days from the date hereof.

Eugene Rice, Judge.

[File endorsement omitted.]

. . . . .

Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 103] IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE TENTH CIRCUIT

No. 2560

UNITED STATES OF AMERICA, Appellant,

vs.

OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,  
Appellee

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO  
RELY ON APPEAL, AND DESIGNATION OF PARTS OF THE RECORD  
TO BE PRINTED—Filed May 15, 1942

Comes now the above named appellant, United States of America, by William H. Landram, Assistant United States Attorney for the Eastern District of Oklahoma, and pursuant to Rule 13 of the Revised Rules of the United States Circuit Court of Appeals for the Tenth Circuit, states that the point on this appellant intends to rely on appeal in the above case is as follows:

1. No part of the restricted estate of a deceased allottee of the Five Civilized Tribes of Oklahoma is subject to the estate and inheritance tax laws of the State of Oklahoma.

Designation of Parts of Record and Proceedings To Be  
Printed

The Clerk will cause to be printed for the consideration of the court in deciding this case the following parts of the record:

1. Complaint and Exhibits of Plaintiff.
2. Answer of Defendant.



3. Stipulation and agreement filed July 15, 1941.
4. Order Admitting Certain Patents and Oil and Gas Lease into Evidence.
5. Findings of Fact and Conclusions of Law.
- [Col. 104] 6. Judgment.
7. Notice of Appeal.
8. Order Extending the Time for Filing the Record on Appeal and Docketing the Action.
9. Statement of Points on which the United States of America intends to rely on appeal.
10. Stipulation Designating Parts of the Record, Proceedings and Evidence to be Included in the Record on Appeal.
11. This Statement of Points on which Appellant Relies and Designation of Parts of the Record and Proceedings to be Printed.

United States of America, by William H. Landram,  
Assistant United States Attorney, Attorney for  
Appellant.

STATE OF OKLAHOMA,  
County of Muskogee, ss:

#### Affidavit of Mailing

William H. Landram, of lawful age, being first duly sworn upon his oath, deposes and states:

That on the 13th day of May, 1942, he enclosed a copy of the above and foregoing statement of points on which appellant intends to rely on appeal, and designation of parts of the record and proceedings to be printed, in an envelope addressed to A. Francis Porta, Attorney, Oklahoma Tax Commission, State Capitol Building, Oklahoma City, Oklahoma; said envelope was securely sealed and being United States Government mail required no postage; said affiant deposited said envelope in the United States Post Office at Muskogee, Oklahoma, on the date aforesaid.

William H. Landram.

Subscribed and sworn to before me this 13th day of  
May, 1942. Chas. T. Diffendaffer, Notary Public.  
My commission expires 11-7-1945. (Seal.)

[File endorsement omitted.]

[fol. 105] IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF OKLAHOMA

Civil Action. No. 419

UNITED STATES OF AMERICA, Plaintiff,

vs.

OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,  
Defendant

COMPLAINT—Filed December 7, 1940

Comes now the plaintiff, United States of America, by Cleon A. Summers, United States Attorney for the Eastern District of Oklahoma, and William H. Landram, Assistant United States Attorney, by authority of the Attorney General of the United States, and at the request of the Secretary of the Interior, in its own behalf and for and on behalf of the Estate of Wosey Deere, deceased full-blood Creek Indian, enrolled opposite Roll No. 9546, and for cause of action against the defendant alleges and states:

I

That the defendant, Oklahoma Tax Commission, was created by the laws of the State of Oklahoma and given the power and authority to make assessments and collections, among other things, of estate and inheritance taxes levied and assessed against estates of deceased persons within the State of Oklahoma;

II

That Wosey Deere, full-blood restricted Creek Indian, enrolled opposite Roll No. 9546, departed this life on or about September 2, 1938, while a resident in good faith of the State of Oklahoma; that according to law the real and personal property belonging to the said Wosey Deere, now deceased, was restricted from alienation, encumbrance and [fol. 106] taxation; that said property was under the control and supervision of the Superintendent for the Five Civilized Tribes, the Secretary of the Interior, and the Plaintiff herein; that the said Wosey Deere, now deceased, was at all times during her lifetime a ward of the plaintiff herein;

## III

That the defendant herein assessed the estate of Wosey Deere, a deceased restricted member of the Five Civilized Tribes, as estate and inheritance taxes, the sum of Nineteen Thousand Twenty-eight and 77/100 Dollars (\$19,028.77); that the Secretary of the Interior and plaintiff herein on the 3rd day of December, 1940, paid to the defendant herein, under protest, the amount of the assessment of said taxes in the sum of Nineteen Thousand Twenty-eight and 77/100 Dollars (\$19,028.77); A duplicate copy of an official receipt of payment of said taxes to said defendant is hereto attached, marked Exhibit "A", incorporated herein and made a part hereof.

## IV

Plaintiff further alleges and states that all property belonging to the estate of Wosey Deere, a restricted member of the Five Civilized Tribes, is restricted and subject to and under the control and supervision of the Secretary of the Interior and the plaintiff by Acts of Congress and laws of the United States;

## V

Plaintiff further alleges and states that the defendant had no right, authority or power, either at law or in equity, to assess the estate of Wosey Deere, a deceased restricted member of the Five Civilized Tribes, for inheritance and estate taxes, as same is an asses-ment against the plaintiff herein and contrary to law; that the said plaintiff is entitled to recover the amount of the asses-ment paid to the defendant by the plaintiff herein.

## VI

That there was allotted and patented to Wosey John, now Deere, as her homestead allotment the non-taxable and restricted lands described as follows:

[fol. 107] The Northeast Quarter of the Southwest Quarter of Section Twenty-eight (28), Township Fourteen (14) North, Range Seven (7) East, Creek County, Oklahoma;

A certified photostatic copy of the homestead allotment deed is attached hereto, marked Exhibit "B" and made a part hereof.

## VII

That there was allotted and patented to Wosey John, now Deere, as her surplus allotment the non-taxable and restricted land described as follows:

The Southeast Quarter of the Southwest Quarter and the West Half of the Southwest Quarter of Section Twenty-eight (28), Township Fourteen (14) North, Range Seven (7) East, Creek County, Oklahoma.

A certified photostatic copy of the surplus allotment deed is attached hereto, marked Exhibit "C" and made a part hereof;

## VIII

That a certificate designating 160 acres of the above described lands as tax exempt was filed for record in the office of the County Clerk of Creek County, Oklahoma, on May 2, 1930; A certified photostatic copy of said certificate is attached hereto, marked Exhibit "D" and made a part hereof.

## IX

Plaintiff further alleges and states that at the time of making said payment of taxes to the Tax Commission it gave notice to said Tax Commission of its intention to file suit for recovery of said taxes; said notice so given is attached hereto, marked Exhibit "E", incorporated herein and made a part hereof.

Wherefore, plaintiff demands judgment against the defendant in the sum of Nineteen Thousand Twenty-eight and 77/100 Dollars (\$19,028.77), plus interest at the rate of 3% per annum from the date of payment by said Secretary of the Interior and plaintiff herein until paid; plaintiff further demands that the said defendant be permanently [fol. 108] enjoined and restrained from assessing or collecting estate or inheritance taxes from the estate of a deceased member of the Five Civilized Tribes, and more particularly the estate of Wosey Deere, full-blood restricted Creek Indian, now deceased, and such temporary and permanent relief as plaintiff may show itself entitled, and for its costs herein expended.

Cleon A. Summers, United States Attorney. William  
H. Landram, Assistant United States Attorney.

[File endorsement omitted.]

## EXHIBIT A TO COMPLAINT

State of Oklahoma  
Oklahoma Tax Commission  
Oklahoma City, Oklahoma

The report or return hereby acknowledged, as stated below, is accepted subject to final audited tax liability.

The accompanying remittance is subject to final audit and solvent credits. Penalties, as provided by law, will attach the same as if no remittance had been made, when, for any reason checks, drafts or other exchange are returned unpaid.

Total Tax Payable	Amount of Remittance	Unpaid Balance
	14,908.67	Dec 2 40

Official Receipt of  
Report, Or Return and  
Remittance As Shown

## Key Letter Shows Kind of Tax Paid

A—Motor Fuel	L—Fuels Excise	Receipt Number	State
B—Corporation License	M—Sales Tax		
C—Gross Production	N—Cigarette		
D—Inheritance Tax	P—Proration Fund		
E—Income Tax	Q—Beverage		
F—Mileage Tax	R—Freight Car Tax		
G—Use Tax	T—Alcohol Permit		
H—Special Fuel Use	U—Used Equipment		
K—Miscellaneous Tax	V—Tokens		
		Street, R. F. D. or Box	
		Wosey John now Deere, Dec'd full blood Creek # 9546, U S of America through the Five Tribe Agency	
		Muskogee, Okla 1,489 D	

G. H. STORMS, Cashier.

[fol. 111]

## EXHIBIT B TO COMPLAINT

## Homestead Deed

Creek Indian Roll, No. 9546

The Muskogee (Creek) Nation,  
Indian Territory

To All Whom These Presents Shall Come, Greeting:

Whereas, By the Act of Congress approved March 1, 1901 (31 Stats., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed, and

Whereas, The said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of Wosey John, a citizen of said tribe, as a homestead.

Now, therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said Wosey John, all right, title, and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following-described land, viz: The North East quarter of the South West quarter of Section Twenty-eight (28), Township Fourteen (14) North, and Range Seven (7) East, of the Indian Base and Meridian, in Indian Territory, containing Forty (40) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by said Act of Congress, and which conditions are that said land shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years; and subject, also, to provisions of [fol. 112] said Act of Congress relating to the use, devise,



and descent of said land after the death of the said Wosey John; and subject, also, to all provisions of said Act of Congress relating to appraisement and valuation and to the provisions of the Act of Congress approved June 30, 1902 (Public No. 200).

In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 14th day of January, A. D. 1904.

P. Porter, Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior, Approved Feb. 5, 1904.  
Ethan A. Hitchcock, Secretary, by Oliver A. Phelps, Clerk.  
L R S. (Seal.)

Filed for record on the 12 day of February, 1904, at 4 o'clock P. M.

Department of the Interior

Office of

Superintendent for the Five Civilized Tribes

Muskogee, Oklahoma

This is to certify that I am the officer having custody of the records of deeds of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Nations, and the above and foregoing is a true and correct copy of the deed issued to Wosey John, Creek 9546, full blood, as the name appears of record in Book No. V, page 66, of Creek Homestead Deed Records.

J. T. Wilkinson, Asst. to Superintendent. (Seal.)

January 3, 1941.

Allotment Deed  
Creek Indian Roll, No. 9546  
The Muskogee (Creek) Nation,  
Indian Territory

To All Whom These Presents Shall Come, Greeting:

Whereas, By the Act of Congress approved March 1, 1901 (31 Stats., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed, and

Whereas, The said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of Wosey John, a citizen of said tribe, as an allotment, exclusive of a forty-acre homestead, as aforesaid,

Now, therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said Wosey John, all right, title, and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following-described land, viz: The South East quarter of the South West quarter and the West Half of the South West quarter of Section Twenty-eighth (28), Township Fourteen (14) North, and Range Seven (7) East, of the Indian Base and Meridian, in Indian Territory, containing One Hundred and Twenty (120) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to all provisions of said Act of Congress [fol. 114] relating to appraisement and valuation and to

the provisions of the Act of Congress approved June 30, 1902 (Public No. 200).

In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 14th day of January, A. D. 1904.

P. Porter, Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior, Approved Feb. 5, 1904.  
Ethan A. Hitchcock, Secretary, by Oliver A. Phelps, Clerk.  
L R S. (Seal.)

Filed for record on the 12 day of February, 1904, at 4 o'clock P. M.

Department of the Interior

Office of

Superintendent for the Five Civilized Tribes

Muskogee, Oklahoma

This is to certify that I am the officer having custody of the records of deeds of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Nations, and the above and foregoing is a true and correct copy of the deed issued to Wosey John, Creek 9546, full blood, as the name appears of record in Book No. 22, page 66, of Creek Allotment Deed Records.

J. T. Wilkinson, Asst. to Superintendent. (Seal.)

January 3, 1941.

[fol. 115]

EXHIBIT D TO COMPLAINT

Certificate 518

Designating Lands Exempt from Taxation

Five Civilized Tribes

Muskogee, Okla., July 31, 1929.

Pursuant to Section 4 of the Act of Congress of May 10, 1928 (Public No. 360, 70th Congress), the following described restricted Indian lands belonging to Wosey John, Sapulpa, Oklahoma, a full blood citizen of the Creek Roll

No. 9546, are hereby selected and designated as tax exempt as long as the title thereto remains in the said Wosey John, or in any full blood Indian heir or devisee of said lands; such tax exemption, in no event, however, to extend beyond April 26, 1956.

Subdivision	Sec.	Twsp.	Range	Area	County
SW4	28	14N	7E	160	Creek✓

✓\*Wosey John.

Department of the Interior

Washington, D. C.

Feb. 3, 1930.

Approved:

Jos. M. Dixon,

First Assistant Secretary.

8WL-17

5-670

STATE OF OKLAHOMA,  
County of Creek:

This instrument was filed in my office for record on May 2, 1930, 10 o'clock A. M., and duly recorded in Book 395 of page 61.

Erma Morris, County Clerk, by Gertrude Davidson,  
Deputy.

[fol. 116] Filed for record on the 25 day of June, 1931,  
at 9 o'clock A. M., and recorded in Book 20, Page 18.

A. M. Landman, Supt. for the Five Civilized Tribes,  
by Gertrude Hooton, Clerk.

Department of the Interior

Office of Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole

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\*To be signed by the Indian, or by the Superintendent if the Indian is a minor, incompetent adult, or where the Indian fails to designate.

Tribes of Indians and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of certificate designating lands exempt from taxation of Wosey John, Creek Fullblood Roll No. 9546.

J. T. Wilkinson, Asst. to Superintendent. (Seal.)

Jan. 3, 1941.

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**EXHIBIT E TO COMPLAINT**

**STATE OF OKLAHOMA,  
County of Muskogee:**

**Notice of Intention to File Suit For Recovery of Taxes**

**To the Oklahoma Tax Commission, State of Oklahoma:**

Take notice that the United States of America, acting on behalf of the Secretary of the Interior, and the estate of Wosey Deere, deceased full-blood Creek Indian, Roll No. 9546, intends to file suit for recovery of estate and inheritance taxes paid on this date by the United States of America and the Secretary of the Interior in the sum of \$14,908.67, being the sum assessed by you as estate and inheritance taxes against said estate.

Cleon A. Summers, United States Attorney, William H. Landram, Assistant United States Attorney.

I acknowledge receipt of a copy of the above notice of intention of the United States of America to file suit for [fol. 117] recovery of the estate and inheritance taxes on this Dec. 3-1940 3 day of December, 1940.

Oklahoma Tax Commission, by J. D. Dunn, Vice-Chairman.

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**IN UNITED STATES DISTRICT COURT**

**ANSWER AND AFFIDAVIT OF SERVICE—Filed February 28, 1941**

Comes now the defendant, Oklahoma Tax Commission, and for its answer to the complaint filed herein denies each and every material allegation therein contained, except as hereinafter specifically admitted, and demands strict proof thereof.

## I

Defendant admits the allegations contained in paragraphs numbered I, VI, VII and IX of the complaint.

## II

Defendant alleges that it is without knowledge or sufficient information to form a belief as to the truth of the allegations contained in paragraphs numbered IV and VIII of the complaint.

## III

Defendant admits that Wosey Deere was a full-blood Creek Indian, enrolled as such opposite Creek Roll No. 9546, and that she departed this life on or about September 2, 1938, while domiciled in and a resident in good faith of the State of Oklahoma; defendant alleges that as to the remaining allegations of paragraph numbered II of the complaint, it is without knowledge or information sufficient to form a belief as to the truth thereof.

## IV

Defendant alleges that Wosey Deere was the owner at the time of her death, of an estate of the gross value of \$359,633.45; that said estate has been valued by the defendant for inheritance and transfer tax purposes at the net value of \$318,794.07, as of the date of the death of Wosey Deere; that said estate, upon the death of said Wosey Deere (September 2, 1938), passed and was transferred to her surviving husband, son and two daughters in different shares under and pursuant to the intestate laws (Laws of Descent and Distribution) of the State of Oklahoma; that the defendant, pursuant to the inheritance and Transfer Tax Law of the State of Oklahoma in force and effect at the time of the death of the said Wosey Deere, assessed inheritance and transfer tax on the transfer of her said estate aggregating the total sum of \$14,908.67; that said transfer was subject to the tax assessed; that said tax was paid to defendant by the Secretary of the Interior on the 3rd day of December, 1940, under protest; defendant admits issuance of "Exhibit A" attached to the complaint; defendant denies that it assessed the estate of Wosey Deere an estate and inheritance tax in the amount of \$14,908.67, or any other amount; defendant alleges that it is without knowl-



edge or information sufficient to form a belief as to the truth of the allegation that Wosey Deere was, at the time of her death, a restricted member of the Five Civilized Tribes.

# V

Defendant denies each and every allegation contained in paragraph numbered V of the complaint; alleges that upon the death of Wosey Deere, her said estate passed, as hereinabove stated, to her surviving husband, son and two daughters in different shares; that the transfer of said estate was under and pursuant to the intestate laws (Laws of Descent and Distribution) of the State of Oklahoma, and subject to the Oklahoma Inheritance and Transfer Tax; that said estate was subject to valuation for inheritance and transfer tax purposes under the laws of the State of Oklahoma; that the defendant, pursuant to its duty and authority under the laws of the State, determined, as aforesaid, the net value of said estate and fixed the same at \$318,794.07, and assessed and collected Oklahoma inheritance and transfer tax upon the transfer thereof in the aggregate sum of \$14,908.67.

Wherefore, Defendant, having fully answered the complaint filed herein, demands judgment under which plaintiff shall be denied the relief sought, and under which plaintiff's [fol. 119] action shall be dismissed, and for all of its costs in and about this matter laid out and expended.

F. M. Dudley, Attorney for Defendant.

Address: State Capitol Building, Oklahoma City, Oklahoma.

STATE OF OKLAHOMA,

County of Oklahoma, ss:

F. M. Dudley, of lawful age, being first duly sworn, states that he is the Attorney for the Oklahoma Tax Commission, defendant in the above numbered and styled cause; that on February 27, 1941, he served a true and correct copy of the above and foregoing answer on the plaintiff by depositing, on said date in the United States Post Office, Capitol Station, Oklahoma City, Oklahoma, a copy of said answer, in a sealed envelope addressed to Mr. Wm. H. Landram, As-

sistant United States Attorney, Federal Building, Muskogee, Oklahoma, attorney for said plaintiff, with postage thereon fully prepaid.

F. M. Dudley.

Subscribed and sworn to before me this 27 day of February, 1941. R. R. Burnham, Notary Public. My commission expires Dec. 28, 1941. (Seal.)

[File endorsement omitted.]

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IN UNITED STATES DISTRICT COURT

STIPULATION AND AGREEMENT—Filed July 15, 1941

Come now the plaintiff, United States of America, by Wm. H. Landram, Assistant United States Attorney and attorney for the plaintiff, and the defendant, Oklahoma Tax Commission of the State of Oklahoma, by F. M. Dudley, attorney for the defendant, and stipulate and agree as follows:

1

That the defendant, Oklahoma Tax Commission, was created by the laws of the State of Oklahoma and, besides other things, was given the power and charged with the duty of assessing and collecting inheritance and transfer taxes laid under the State of Oklahoma.

[fol. 120]

2

That Wosey Deere was a Creek Indian of the full-blood and was enrolled as such opposite Creek Roll No. 9546, and that she departed this life on or about September 2, 1938, while domiciled in, and a resident in good faith of the State of Oklahoma; and that said decedent was at the time of her death, and had been at all times since November 16, 1907, a resident in good faith of and domiciled in the State of Oklahoma; and that said decedent left surviving her husband, Milford Thomas, a seven-eighths blood Cherokee Indian; two daughters and one son, Creek Indians of the full blood.

## 3

That there was allotted and patented to Wosey Deere, as her homestead allotment, the following described lands:

The Northeast Quarter of the Southwest Quarter Section 28, Township 14 North, Range 7 East, Creek County, Oklahoma,

and that there was allotted and patented to Wosey Deere, as her surplus allotment, the following lands:

The Southeast Quarter of the Southwest Quarter; and the West Half of the Southwest Quarter, Section 28, Township 14 North, Range 7 East, Creek County, Oklahoma.

That Wosey Deere was the owner of the above described lands at the time of her death.

## 4

That Wosey Deere inherited from her full blood Creek grandfather, Sak-quanny Long, at his death in 1915, and owned at the time of her death, the following described lands:

The Southwest Quarter of Section 9, Township 18 North, Range 7 East, Creek county, Oklahoma;

and said Wosey Deere also owned at the time of her death four-fifths interest in the following described lands:

[fol. 121] The Northeast Quarter of the Southwest Quarter, Section 2, Township 14 North, Range 7 East, Creek County, Oklahoma.

## 5

That after Wosey Deere became the owner by inheritance, as aforesaid, of the Southwest Quarter of Section 9, Township 18 North, Range 7 East, Creek County, Oklahoma, and during her lifetime, said lands were leased for oil and gas mining purposes under a departmental oil and gas mining lease or leases, approved by the Secretary of the Interior, for a period of ten years, or as long thereafter as oil and gas is produced in paying quantities. Production was had under said lease or leases from said Southwest Quarter of Section 9, Township 18 North, Range 7 East, Creek County, Oklahoma, about 1915 and during the lifetime of said de-

cedent, Wosey Deere, and the Secretary of the Interior received, under the provisions of said lease or leases, from 1915 to date of decedent's death, the royalty payments or income belonging to said decedent on account thereof. That out of such royalty payments, so received by the Secretary of the Interior, said Secretary purchased for Wosey Deere United States Treasury Bonds, and at the time of the death of Wosey Deere there was credited to her account on the books of the Interior Department United States Treasury Bonds of a total face value of \$295,304.38, and the fair market value of these Bonds, with accrued interest thereon at the date of Wosey Deere's death, was \$297,763.31; that all such royalty payments received by the Secretary of the Interior in excess of the amount or amounts invested by him, as aforesaid, in United States Treasury Bonds were deposited by said Secretary, along with all other funds currently received by him on behalf of all restricted Indians, in banks to his own account, and said Secretary gave Wosey Deere credit therefor on the books of the Interior Department.

That at the time of Wosey Deere's death there were credited to her account, on the books of the Interior Department, United State Treasury Bonds, so purchased as aforesaid by the Secretary of the Interior, of the face value of \$295,304.38, with interest accrued thereon in the amount of [fol. 122] \$2,458.93, and at the time of said Wosey Deere's death she had a cash credit on the books of the Interior Department, created as aforesaid, in the amount of \$40,772.19.

## 6

That Wosey Deere was the owner at the time of her death of an estate of the gross value of \$359,633.45, consisting of the following:

The SW $\frac{1}{4}$  of Section 9, Township 18 North, Range 7 East, Creek County, Oklahoma, (inherited from her grandfather) above mentioned under paragraphs 4 and 5 \$800.00

The NE $\frac{1}{4}$  of SW $\frac{1}{4}$ , Section 2, Township 14 North, Range 7 East, Creek County, Oklahoma, (4/5 interest) mentioned above under paragraph 4. \$350.00

The Southwest Quarter of Section 28, Township 14 North, Range 7 East, Creek County, Oklahoma, mentioned under paragraph 3 above: \$2,700.00

The SW $\frac{1}{4}$ , Section 9, Township 18 North, Range 7 East,  
Creek County, Oklahoma: \$440.00,

per month income during the year of the death of Wosey  
Deere (This land produced oil and gas since 1915) \$13,000.00

United States Treasury Bonds credited to the account of  
Wosey Deere on the books of the Interior Department at  
the time of her death mentioned under paragraph 5 above,  
\$295,304.38

Interest accrued on said Bonds, \$2,458.93

Cash credit, mentioned under paragraph 5 above, on the  
books of the Interior Department, \$40,772.19

Wrecked automobile, \$75.00

Judgment in case Wosey Deere vs. Shell Petroleum Co.,  
No. 2694—Law, U. S. District Court, Northern District of  
Oklahoma: \$500.00

Miscellaneous items: \$1,511.95

Life insurance policy of General American Life Insur-  
ance Company, St. Louis, Missouri, in favor of decedent's  
[fol. 123] three children, on which \$7,387.00 was paid to  
each; total \$22,161, less \$20,000.00

exemption: \$2,161.00

Total: \$359,633.45

7

That Wosey Deere died intestate and her said estate  
aforesaid, was transferred and passed to her 7/8 blood  
Indian husband and two daughters and son, all full-bloods.

That Wosey Deere's gross estate, of the value of \$359,-  
633.45, was valued by the defendant, Oklahoma Tax Com-  
mission, for Oklahoma inheritance tax purposes, at the net  
value of \$318,794.07 as of the date of said decedent's death.  
That said defendant, acting pursuant to the Oklahoma In-  
heritance and Transfer Tax Law in force at the time of  
Wosey Deere's death, assessed inheritance and transfer  
tax in the aggregate of \$14,908.67.

That the Secretary of the Interior on the 3rd day of De-  
cember, 1940, paid to the defendant, Oklahoma Tax Com-  
mission, under protest, said sum and received therefor an  
official receipt of payment, which receipt is attached to the

complaint, marked "Exhibit A", incorporated therein and made a part thereof.

## 8

That all of the funds, including United States Treasury Bonds above mentioned, belonging to the decedent at the time of her death, were then and have been at all times since then, retained and supervised by the Secretary of the Interior.

## 9

That "Exhibit D" attached to and made a part of the complaint was filed of record in the office of the County Clerk of Creek County, Oklahoma on May 2, 1930.

## 10

That if the transfer of Wosey Deere's estate be subject to the Oklahoma inheritance and transfer tax in force and [fol. 124] effect at the time of her death, it is agreed that the net value of her said estate was \$318,794.07, as of that date, and that the inheritance and transfer tax of \$14,908.67, assessed on the transfer of said estate was and is the correct amount of tax. Should it be ultimately determined by the Court that only a part of the estate of decedent was subject to the Oklahoma Inheritance and Transfer Tax then and in that event the tax will have to be recomputed.

## 11

That Wosey Deere is one and the same person as Wosey John and Wosey Thomas.

## 12

That the tax so paid by the Secretary of the Interior to the defendant, Oklahoma Tax Commission, was paid under protest and at the time of making said payment the Secretary of the Interior gave notice in writing to the defendant of his intention to file suit for the recovery of said tax.

## 13

That the credits hereinabove mentioned were carried on the books of the Interior Department, kept by the Superintendent of the Five Civilized Tribes at Muskogee, Oklahoma.



## 14

Whether or not the lands, or any part thereof, described in this stipulation were restricted at the time of or subsequent to the death of decedent is a question of law upon which the parties are not agreed; However, it is agreed that the Secretary of the Interior never at any time issued any instrument removing restrictions on said lands or any part thereof. It is further agreed that either party may introduce in evidence certified copies of the patents under which said lands were originally patented.

It is Further Stipulated and Agreed by and between the parties hereto that each party reserves the right to introduce further testimony and evidence in support of its plead-[fol. 125] ings, which is not inconsistent with the facts herein stipulated.

Dated this 15th day of July, 1941.

United States of America, Plaintiff. William H. Landram, Assistant United States Attorney, Attorney for Plaintiff. Oklahoma Tax Commission, Defendant. F. M. Dudley, Attorney for Defendant.

[File endorsement omitted.]

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IN UNITED STATES DISTRICT COURT

ORDER ADMITTING CERTAIN PATENTS AND OIL AND GAS LEASE  
INTO EVIDENCE—Filed October 11, 1941

Now on this 11th day of October, 1941, the United States of America, plaintiff herein, appeared by William H. Landram, Assistant United States Attorney for the Eastern District of Oklahoma, and reported to the court that in Part 14 of the Stipulation and Agreement filed herein by the plaintiff and the defendant, it was agreed that either party might introduce into evidence certified copies of the patents under which the lands involved herein were originally patented. The said plaintiff offers the hereinafter named certified copies of patents and oil and gas mining lease as evidence in this case.

The court finds that in accordance with the stipulation and agreement signed by the plaintiff and defendant, said

certified copies of the patents should be admitted into evidence in this case.

It is Therefore Ordered, Adjudged and Decreed by the court that the following certified copies of patents be admitted into evidence:

Homestead Deed Patent of Che-qu-a-wa—Exhibit "A".

Homestead Deed Patent of Wosey John—Exhibit "B".

Allotment Deed Patent of Wosey John—Exhibit "C".

Homestead Deed Patent of Sakquanny Long—Exhibit "D".

[fol. 126] It is further ordered, adjudged and decreed that a certified copy of the oil and gas mining lease, dated the 10th day of April, 1912, signed by Sakquanny Long be introduced into evidence and marked Exhibit "E".

Eugene Rice, Judge.

O. K. F. M. Dudley, Attorney for Defendant.

O. K. William H. Landram, Attorney for Plaintiff.

[File endorsement omitted.]

(Exhibits "B" and "C" are omitted for the reason same appear at pages 111 and 113 respectfully.)

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## EXHIBIT A

### Homestead Deed

Creek Indian Roll, No. 9785

The Muskogee (Creek) Nation

Indian Territory

To All Whom These Presents Shall Come, Greeting:

Whereas, By the Act of Congress approved March 1, 1901 (31 Stats., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed, and

Whereas, The said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of Che-quaw, a citizen of said tribe, as a homestead,

Now, therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power [fol. 127] and authority vested in me by the aforesaid Act of the Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said Che-quaw, all right, title, and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following-described land, viz: The North East quarter of the South West quarter of Section Two (2), Township Fourteen (14) North, and Range Seven (7) East, of the Indian Base and Meridian, in Indian Territory, containing Forty (40) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by said Act of Congress, and which conditions are that said land shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years; and subject, also, to provisions of said Act of Congress relating to the use, devise, and descent of said land after the death of the said Che-quaw; and subject, also, to all provisions of said Act of Congress relating to appraisement and valuation and to the provisions of the Act of Congress approved June 30, 1902 (Public No. 200).

In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 1st day of April, A. D. 1904.

P. Porter, Principal Chief of the Muskogee (Creek) Nation. (Seal.)

Department of the Interior.

Approved April 26, 1904. Ethan A. Hitchcock, Secretary,  
by Oliver A. Phelps, Clerk. L. R. S.

Department of the Interior  
Office of  
Superintendent for the Five Civilized Tribes  
Muskogee, Oklahoma

This is to certify that I am the officer having custody of the records of deeds of the Choctaw, Chickasaw, Cherokee, [fol. 128] Creek and Seminole Nations, and the above and foregoing is a true and correct copy of the deed issued to Che-qua-wa as the name appears of record in Book No. W, page 338, of Muskogee (Creek) Homestead Deed Records.

J. T. Wilkinson, Asst. to Superintendent. (Seal.)

May 6, 1942.

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EXHIBIT D

Homestead Deed

Creek Indian Roll, No. 8522

The Muskogee (Creek) Nation

Indian Territory

To All Whom These Presents Shall Come, Greeting:

Whereas, By the Act of Congress approved March 1, 1901 (31 Stats., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed, and

Whereas, The said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of Sak quanny Long, a citizen of said tribe, as a homestead,

Now, therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power

and authority vested in me by the aforesaid Act of the Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said Sak quanny Long, all right, title, and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation [fol. 129] in and to the following-described land, viz: The South East quarter of the South West quarter of Section Nine (9), Township Eighteen (18) North, and Range Seven (7) East, of the Indian Base and Meridian, in Indian Territory, containing Forty (40) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by said Act of Congress, and which conditions are that said land shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years; and subject, also, to provisions of said Act of Congress relating to the use, devise, and descent of said land after the death of the said Sak quanny Long; and subject, also, to all provisions of said Act of Congress relating to appraisement and valuation and to the provisions of the Act of Congress approved June 30, 1902 (Public No. 200).

In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 28th day of April, A. D. 1903.

P. Porter, Principal Chief of the Muskogee (Creek) Nation. (Seal.)

Department of the Interior.

Approved June 2, 1903. Ethan A. Hitchcock, Secretary,  
By Oliver A. Phelps, Clerk. L. R. S.

Filed for record on the 2 day of July, 1903, at 1 o'clock P. M.

Department of the Interior

Office of

Superintendent for the Five Civilized Tribes

Muskogee, Oklahoma

This is to certify that I am the officer having custody of the records of deeds of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Indians, and the above and foregoing is

a true and correct copy of the deed issued to Sak quanny [fol. 130] Long as the name appears of record in Book No. M, page 99, of Muskogee (Creek) Homestead Deed Records.

J. T. Wilkinson, Asst. to Superintendent. (Seal.)

July 15, 1941.

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**EXHIBIT E**

**United States**

**Department of the Interior**

**Office of Indian Affairs**

**Washington, July 24, 1941.**

I, J. W. Hutchison, Acting Commissioner of Indian Affairs, do hereby certify that the papers hereunto attached are true copies of the originals as the same appear of record in this Office.

In Testimony Whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed on the day and year first above written.

J. W. Hutchison, Acting Commissioner. (Seal.)

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**Oil and Gas Mining Lease Upon Land Selected for Allotment**

**Creek Nation, Oklahoma**

This Indenture of Lease, Made and entered into in quadruplicate on this 10th day of April, A. D. 1912, by and between Sakquanny Long of Kelleyville, Oklahoma, enrolled as a full blood citizen of the Creek Nation, Roll No. — party of the first part, hereinafter designated as lessor, and W. D. Cornelius of Muskogee, Oklahoma, party of the second part, [fol. 131] hereinafter designated as lessee, under and in pursuance of the provisions of the Act of Congress approved May 27, 1908 (35 Stat. L. P. 312), Witnesseth:

1. The lessor, for and in consideration of one dollar, the receipt whereof is acknowledged, and of the royalties, covenants, stipulations, and conditions hereinafter contained, and hereby agreed to be paid, observed, and performed by



the lessee, does hereby demise, grant, lease, and let unto the lessee, for the term of ten years from the date of the approval hereof by the Secretary of the Interior, and as much longer thereafter as oil or gas is found in paying quantities, all the oil deposits and natural gas in or under the following described tract of land, lying and being within the county of Creek and State of Oklahoma, to-wit: The West Half of the Southwest Quarter and the Northeast Quarter of the Southwest Quarter. And the Southeast Quarter of the Southwest Quarter of section 9, township 18, range 7 East of the Indian Meridian, and containing 160 acres, more or less, with the exclusive right to prospect for, extract, pipe, store, and remove oil and natural gas, and to occupy and use so much only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing, and removing such oil and natural gas, also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, and also the right to use, free of cost, oil and natural gas as fuel so far as necessary to the development and operation of said property.

2. The lessee hereby agrees to pay or cause to be paid to the United States Indian Superintendent, Union Agency, Muskogee, Oklahoma, for the lessor, as royalty, the sum of 12½ per cent of the gross proceeds of all crude oil extracted from the said land, such payment to be made at the time of sale or removal of the oil. And the lessee shall pay as royalty on each gas producing well three hundred dollars per annum in advance, to be calculated from the date of commencement of utilization: Provided, however, in the case of gas wells of small volume, when the rock [fol. 132] pressure is one hundred pounds or less, the parties hereto may, subject to the approval of the Secretary of the Interior, agree upon a royalty which will become effective as a part of this lease: Provided, further, That in cases of gas wells of small volume, or where the wells produce both oil and gas or oil and gas and salt water to such an extent that the gas is unfit for ordinary domestic purposes, or where the gas from any well is desired for temporary use in connection with drilling and pumping operations on adjacent or nearby tracts, the lessee shall have the option of paying royalties upon such gas wells of the same

percentage of the gross proceeds from the sale of gas from such wells as is paid under this lease for royalty on oil. The lessor shall have the free use of gas for domestic purposes in his residence on the leased premises, provided there be surplus gas produced on said premises over and above enough to fully operate the same. Failure on the part of the lessee to use a gas producing well, which can not profitably be utilized at the rate herein prescribed, shall not work a forfeiture of this lease so far as the same relates to mining oil, but if the lessee desires to retain gas producing privileges, the lessee shall pay a rental of one hundred dollars per annum, in advance, calculated from date of discovery of gas, on each gas producing well, gas from which is not marketed or not utilized otherwise than for operations under this lease. Payments of annual gas royalties shall be made within twenty-five days from the date such royalties become due, other royalty payments to be made monthly on or before the 25th day of the month succeeding that for which such payment is to be made, supported by sworn statements.

3. Until a producing well is completed on said premises the lessee shall pay, or cause to be paid, to the Superintendent, Union Agency, Muskogee, Oklahoma, for lessor, as advance annual royalty, from the date of the approval of this lease, fifteen cents per acre per annum, annually, in advance, for the first and second years; thirty cents per acre per annum, annually, in advance, for the third and fourth years; seventy-five cents per acre per annum, annually, in advance, for the fifth year; and one dollar per acre per annum, annually, in advance, for each succeeding year of the term of this lease; it being understood and agreed [fol. 133] that such sums of money so paid shall be a credit on stipulated royalties, and the lessee hereby agrees that said advance royalty when paid shall not be refunded to the lessee because of any subsequent surrender or cancellation thereof; nor shall the lessee be relieved from its obligation to pay said advance royalty annually when it becomes due, by reason of any subsequent surrender or cancellation of this lease.

4. The lessee shall exercise diligence in sinking wells for oil and natural gas on land covered by this lease and shall drill at least one well thereon within one year from the date of approval of this lease by the Secretary of the Interior,

or shall pay to the United States Indian Superintendent, Union Agency, Muskogee, Oklahoma, for the use and benefit of the lessor, for each whole year the completion of such well is delayed after the date of such approval by the Secretary of the Interior, for not to exceed ten years from the date of such approval, in addition to the other consideration named herein, a rental of one dollar per acre, payable annually; and if the lessee shall fail to drill at least one well within any such yearly period and shall fail to surrender this lease by executing and recording a proper release thereof and otherwise complying with paragraph numbered 7 hereof on or before the end of any such year during which the completion of such well is delayed, such failure shall be taken and held as conclusively evidencing the election and covenant of the lessee to pay the rental of one dollar per acre for such year, and thereupon the lessee shall be absolutely obligated to pay such rental. The failure of the lessee to pay such rental before the expiration of fifteen days after it becomes due at the end of any yearly period, during which a well has not been completed as provided herein, shall be a violation of one of the material and substantial terms and conditions of this lease, and be cause for cancellation of such lease under paragraph numbered 9 hereof; but such cancellation shall not in any wise operate to release or relieve the lessee from the covenant and obligation to pay such rental, or any other accrued obligation. The lessee may be required by the Secretary of the Interior, or by such [fol. 134] officer as may be designated by him for the purpose, to drill and operate wells to offset wells on adjoining tracts, and within three hundred feet of the dividing line, or in case of gas wells, lessee may have the option, in lieu of drilling offset wells, of paying a sum equal to the royalties which would accrue on each well to be offset if said wells had been drilled and were being operated on the land described herein and in accordance with the terms hereof. It is understood and agreed by the parties hereto that offset wells shall be drilled, or royalty paid in lieu of drilling, within ten days after the lessee is notified to do so, and failure to comply with such requirement shall constitute a violation of one of the substantial terms of this lease.

5. The lessee shall carry on development and operations in a workmanlike manner, commit no waste on the said land and suffer none to be committed upon the portion in his

occupancy or use, take good care of the same and promptly surrender and return the premises upon the termination of this lease to lessor or to whomsoever shall be lawfully entitled thereto, unavoidable casualties excepted; shall not remove therefrom any buildings or permanent improvements erected thereon during the said term by the said lessee, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, excepting the tools, derricks, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines and machinery, and the casing of all dry or exhausted wells which shall remain the property of the lessee, and may be removed at any time prior to sixty days after the termination of the lease by forfeiture or otherwise; and shall not permit any nuisance to be maintained on the premises under lessee's control, nor allow any intoxicating liquors to be sold or given away for any purposes on such premises; shall not use such premises for any other purpose than those authorized in the lease; and before abandoning any well shall securely plug the same so as effectually to shut off all water from the oil-bearing stratum, or in the manner required by the laws of the State of Oklahoma.

[fol. 135] 6. The lessee shall keep an accurate account of all oil-mining operations, showing the sales, prices, dates, purchases, and the whole amount of oil mined or removed; and all sums due as royalty shall be a lien on all implements, tools, movable machinery, and all other personal chattels used in operating said property, and upon all of the unsold oil obtained from the land herein leased, as security for payment of said royalty.

7. The lessee may at any time, by paying to the Indian Superintendent all amounts then due as provided herein and the further sum of one dollar, surrender and cancel this lease and be relieved from all further obligations or liability thereunder: Provided, if this lease has been recorded lessee shall execute a release and record the same in the proper county recording office: Provided, further, in event restrictions are removed from all leased premises, the lessee may surrender all the undeveloped portion thereof, by paying the lessor all amounts then due and the further sum of one dollar, which surrender shall not affect the terms hereof as to each producing well and ten acres

of said premises as nearly in square form as possible next contiguous to and surrounding each of said wells, and execute and record a cancellation of premises surrendered.

8. This lease shall be subject to the regulations of the Secretary of the Interior, now or hereafter in force, relative to such leases, all of which regulations are made a part and condition of this lease: Provided, however, that no regulations made after the approval of this lease, affecting either the length of term of oil and gas leases, the rates of royalty or payment thereunder, or the assignment of leases, shall operate to affect the terms and conditions of this lease.

9. Upon the violation of any of the substantial terms and conditions of this lease the Secretary of the Interior (or lessor, in event restrictions are removed as provided in paragraph 12 hereof) shall have the right, at any time after thirty days' notice to the lessee specifying the terms or conditions violated, to declare this lease null and void, [fol. 136] and the lessor shall then be entitled and authorized to take immediate possession of the land.

10. Before this lease shall be in force and effect the lessee shall furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, and such further bond or bonds as may be required by said Secretary, conditioned for the performance of this lease, which bond shall be deposited and remain on file in the Indian office.

11. Assignment of this lease or any interest therein may be made with the approval of the Secretary of the Interior, it being understood that to secure such approval the proposed assignee need only be qualified to hold such a lease under the rules and regulations, and furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, conditioned for the faithful performance of the covenants and conditions of this lease.

12. In event restriction on alienation shall be removed from all the leasehold premises described above, this lease shall be released from the supervision of the Secretary of the Interior, such release to take effect without further agreement, from the date such restrictions are removed, and thereupon the authority and power delegated to the



Secretary of the Interior as herein provided shall cease, and all payments required to be made to the United States Indian Superintendent shall thereafter be made to lessor or the then owner of said lands in person or be deposited to the credit of said lessor or his assigns at the Sapulpa State Bank, of Sapulpa, Oklahoma, or at such other place as the said lessor or his assigns may from time to time designate in writing, and changes in regulations thereafter made by the Secretary of the Interior applicable to oil and gas leases shall not apply to this lease.

13. Each and every clause and covenant in this indenture shall extend to the heirs, executors, administrators, successors, and lawful assigns of the parties hereto.

14. In witness whereof, the said parties have hereunto [fol. 137] subscribed their names and affixed their seals on the day and year first above mentioned.

Sakquanny Long, his (thumb print) mark. (Seal.)  
W. D. Cornelius. (Seal.)

Attest:

Two witnesses to execution by lessor: Stephen B. Nelson, P. O., Sapulpa, Oklahoma; Moses Bailey, P. O., Sapulpa, Oklahoma.

Two witnesses to execution by lessee: J. A. Park, P. O., Muskogee, Oklahoma; G. G. Johnson, P. O., Muskogee, Oklahoma.

STATE OF OKLAHOMA,  
County of Creek, ss:

..... before me, a Notary Public in and for said county and state, on this .. day of April, 1912, personally appeared Sakquanny Long, to me known to be the identical person ... who executed the within and foregoing lease, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Orange B. Pickett. (My commission expires Aug. 17, 1915.) (Seal.)



Department of the Interior  
United States Indian Service, Union Agency

Muskogee, Okla., May 29, 1912.

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be Approved. See my report of even date.

(Sig. Illegible), United States Indian Superintendent.

[fol. 138]      Department of the Interior,  
                         Office of Indian Affairs

Washington, D. C., June 12, 1912.

Respectfully submitted to the Secretary of the Interior, with recommendation that it be Approved.

F. H. Abbott, Assistant Commissioner.

Department of the Interior

Washington, D. C., June 26, 1912.

Approved.

✓Connie A. Thompson, Assistant Secretary of the Interior.

Filed for record this 2 day of May, 1912, at 4 o'clock, P. M.

Dana H. Kelsey, Supt. Union Agency, by R. W. Fields,  
O. C.

Advance Royalty Received \$24.00.

Lease No. 22773

Department of the Interior  
Washington, D. C.

June 30, 1913.

The assignment of this lease by W. D. Cornelius, lessee, to Bernard B. Jones as to the NE/4 of the SW/4 and the SE/4 of the SW/4 of 9-18-7, containing 80 acres, is Approved, effective only from date of approval, subject to the orders and regulations of this Department now existing

or hereafter to be promulgated. The price basis for computation of royalty on oil shall be the market price as ascertained and declared by the Secretary of the Interior, and the royalty shall be  $12\frac{1}{2}$  per cent on such price basis.

A. A. Jones, First Assistant Secretary.

Filed by L. M. G.

[fol. 139]

Lease No. 22773

Department of the Interior

Washington, D. C.

October 27, 1913.

The assignment of this lease by W. D. Cornelius to the Katy Oil Co. insofar as pertains to W/2 of SW/4 of Sec. 9, Twp. 18, R. 7 East, is Approved, effective only from date of approval, subject to the orders and regulations of this Department now existing or hereafter to be promulgated. The price basis for computation of royalty on oil shall be the market price as ascertained and declared by the Secretary of the Interior, and the royalty shall be  $12\frac{1}{2}$  per cent on such price basis.

Louis C. Saylin, Assistant Secretary.

Lease No. 22773

Department of the Interior

Washington, D. C.

April 18, 1916.

The assignment of this lease by Bernard B. Jones, assignee, to the Bermont Oil Company insofar as pertains to the E $\frac{1}{2}$  SW $\frac{1}{4}$ , Sec. 9, T. 18, R. 7, 80 acres, is Approved, effective only from date of approval, subject to the orders and regulations of this Department now existing or hereafter to be promulgated. The price basis for computation of royalty on oil shall be the market price as ascertained and declared by the Secretary of the Interior, and the royalty shall be  $12\frac{1}{2}$  per cent on such price basis.

B. O. Sweeney, Assistant Secretary. EBM H

## Lease No. 22773

Department of the Interior

Washington, D. C.

December 20, 1916.

The assignment of this lease by the Bermont Oil Company, assignee, to the Prairie Oil and Gas Company inso- [fol. 140] far as pertains to the E $\frac{1}{2}$  SW $\frac{1}{4}$  of Sec. 9, T. 18, R. 7, is Approved, with the understanding and provision that no rights, claims, or equities, as against future action by or under authority of Congress respecting oil or gas pipe line companies, shall be predicated upon this approval and subject to the orders and regulations of this Department now existing or hereafter to be promulgated. The price basis for computation of royalty on oil shall be the market price as ascertained and declared by the Secretary of the Interior, and the royalty shall be 12 $\frac{1}{2}$  per cent on such price basis.

B. O. Sweeney, Assistant Secretary. EB Mc

## Lease No. 22773

Department of the Interior

Washington, D. C.

March 9, 1918.

The assignment of this lease insofar as it pertains to the W/2 of SW/4 9-18-7 E., by Katy Oil Company to Sinclair Oil and Gas Co. is Approved, effective only from date of approval, subject to the orders and regulations of this Department now existing or hereafter to be promulgated. The price basis for computation of royalty on oil shall be the market price as ascertained and declared by the Secretary of the Interior, and the royalty shall be 12 $\frac{1}{2}$  per cent on such price basis.

Alexander V. (Illegible), First Assistant Secretary.

C J g B EB W EBM

## IN UNITED STATES DISTRICT COURT

**Findings of Fact and Conclusions of Law**—Filed December 18, 1941

This action was instituted by the United States for itself and in behalf of the estate of Wosey Deere, deceased full-blood Creek Indian, to recover the sum of \$14,908.67, with interest, representing the amount assessed by the Oklahoma Tax Commission as an inheritance tax upon the transfer [fol. 141] of the estate of said Wosey Deere, who died intestate September 2, 1938. The tax was paid under protest by the Secretary of the Interior and the United States, and this action is to recover same pursuant to the provisions of 68 Okl. Ann., Sec. 1475.

The cause was tried before the Court and submitted upon written briefs of the parties. The material facts were stipulated.

## FINDINGS OF FACT

The facts as stipulated were reduced to writing, signed by the parties and filed herein. The court finds the facts to be as stipulated. Briefly summarized the essential facts for determination of this cause are as follows:

## I

Wosey Deere is one and the same person as Wosey John and Wosey Thomas.

## II

Wosey Deere was a full-blood Creek Indian, enrolled as such opposite Creek Roll No. 9546. She died intestate, September 2, 1938, while domiciled in and a resident in good faith of the State of Oklahoma. She left surviving as her sole heirs at law her husband, Milford Thomas, a seven-eighth's blood Cherokee Indian; two daughters and one son all full-blood Creek Indians. See *Seber vs. Thomas*, 108 F. (2d) 856.

## III

Wosey Deere died seized of the following estate:

**Real Property:**

Her homestead and surplus allotments consisting of 160 acres,

The inherited allotment of her full-blood Creek grandfather consisting of 160 acres,

Four-fifth's interest in forty acres of land (the stipulation does not disclose how this land was acquired),  
[fol. 142] Personal Property:

U. S. Treasury Bonds purchased for her account out of proceeds from the sale of oil and gas produced from her inherited lands,

Cash credit on the books of the Interior Department representing proceeds from the sale of said oil and gas (both the bonds and the cash were in the custody of and in the control of the Secretary of the Interior at the time of the death of Wosey Deere,)

A judgment against the Shell Petroleum Company for the sum of \$500,

Miscellaneous items valued at \$1,511.95.

In addition to the real and personal property the decedent left life insurance payable to her three full-blood children in the sum of \$22,161. The state in figuring the tax herein treated \$2,161 of this insurance as subject to the tax. The gross value of the said estate was \$359,643.45 and was valued by the Oklahoma Tax Commission for inheritance tax purposes at the net value of \$318,794.07.

#### IV

A certificate designating 160 acres of Wosey Deere's lands (this 160 acres being her homestead and surplus allotments) as tax-exempt was filed for record in the office of the County Clerk of Creek County, Oklahoma, on May 2, 1930.

#### V

The Secretary of the Interior, never at any time issued any instrument removing restrictions on said lands or any part thereof; and all of the funds, including the United States Treasury Bonds, belonging to decedent at the time of her death, were then and have been at all times since then, retained under the supervision and control of the Secretary of the Interior and the credits therefor were carried upon the books of said Department, kept by the Superintendent for the Five Civilized Tribes at Muskogee, Oklahoma.

[fol. 143]

#### VI

The defendant Oklahoma Tax Commission, acting pursuant to The Oklahoma Inheritance and Transfer Tax Law in force at the time of Wosey Deere's death, assessed an in-

heritance tax upon the transfer of her estate in the sum of \$14,908.67, which is the correct amount of tax if said transfer is taxable in its entirety.

## VII

On December 3, 1940, the Secretary of the Interior paid said tax to the defendant, under written protest; and at such time the Secretary gave notice in writing to the defendant of his intention to file suit for the recovery of said tax.

## CONCLUSIONS OF LAW

### I

This is a suit of a civil nature brought by the United States of which this court has original jurisdiction, 28 U. S. C. A. Sec. 41 (1).

### II

All the real property with the possible exception of the 4/5's interest in forty acres owned by Wosey Deere was restricted. One hundred sixty acres of all her lands was tax-exempt. The income derived from her inherited lands and subject to the control and in the custody of the Secretary of the Interior was restricted. In the hands of the full-blood heirs all the real property was restricted. As to the 7/8's blood heir, the interest in the inherited tax-exempt 160 acres was restricted. The personal property in the custody and control of the Secretary of Interior was restricted in hands of all the heirs. Secs. 1 and 8, Act of January 27, 1933 (47 Stat. 777); Sec. 9, Act of May 27, 1908 (35 Stat. 315) as amended by Sec. 1, Act of April 12, 1926 (44 Stat. 239); Sec. 2, Act of May 10, 1928 (45 Stat. 495); Glenn v. Lewis, 105 F. (2d) 398.

### III

The applicable Oklahoma Law provides as follows:

"A tax is hereby levied upon the transfer of the net estate of every decedent, \* \* \* of property, real, personal or [fol. 144] mixed, whether tangible or intangible, or any interest therein or income therefrom, by will or the intestate laws of this State, \* \* \*."

Art. 5, Chap. 66, S. L. of Oklahoma, 1935.



## IV

An inheritance tax or transfer tax such as is provided by the Oklahoma law is not levied on the property of which the estate is composed. It is an excise tax upon the shifting of economic benefits, on the privilege of transferring property at death, on the transitus of the property from the dead to the living, *United States Trust Co. v. Helvering*, 307 U. S. 57; *United States v. Perkins*, 163 U. S. 625, *McGannon v. State*, 33 Okl. 145, 124 P. 1063, *Knowlton v. Moore*, 178 U. S. 41, *Landman v. Commissioner of Internal Revenue (C. C. A. 10th)* 123 F. (2d) —, decided November 11, 1941, and cases cited therein.

## V

This case is primarily concerned with the question of whether or not a transfer or inheritance tax may be levied by the State of Oklahoma upon the estate of a full-blood Indian which estate consisted principally of restricted property, restricted in the hands of the decedent and in the hands of the heirs. A tax upon the transfer of property is valid even though the property is restricted and tax-exempt. *Plummer v. Coler*, 178 U. S. 115; *Orr v. Gilman*, 183 U. S. 278; *United States Trust Co. v. Helvering*, *supra*. The transfer of the restricted estate of a full-blood restricted member of one of the Five Civilized Tribes is subject to the Federal Estate Tax. Such an estate is not deemed exempt from a transfer tax on the ground that it is a Federal instrumentality. It is not deemed a Federal instrumentality. *Landman v. Commissioner of Internal Revenue*, *supra*, and cases cited therein.

## VI

The estate herein passed under the intestate laws of the State of Oklahoma. Members of the Five Civilized Tribes are citizens of the State of Oklahoma, *Bolen v. Nebraska*, 176 U. S. 831, *Hickman v. United States*, 224 U. S. 413. As [fol. 145] to the members of the Five Civilized Tribes it has been the policy of Congress to subject the estates of members of said tribes to the control of the local laws of succession. Sec. 23 of the Act of April 26, 1906 (34 Stat. 137) as amended; Sec. 9 of the Act of May 27, 1908 (35 Stat. 312) as amended; *Blundell v. Wallace*, 267 U. S. 373, *Jackson v. Harris (C. C. A. 10th)* 43 F. (2d) 513; *Jefferson*

v. Fink, 247 U. S. 288. *Dunn v. Micco* (C. C. A. 10th) 106 F. (2d) 356.

## VII

Congress has the power to control the devolution of the estates of members of the Five Civilized Tribes. The State of Oklahoma concedes that Congress has this power, but contends that Congress has seen fit, by its various acts, to make applicable, the laws of the State of Oklahoma to the devolution of the estates of the members of the Five Civilized Tribes. The construction of these acts of Congress and a consideration of whether or not the laws of Congress or the laws of the State of Oklahoma control the devolution of the estates of members of the Five Civilized Tribes is a Federal question and the decisions of the Federal courts are controlling. The Federal decisions, both of the Circuit Court, and the Supreme Court in *Blundell v. Wallace*, *supra*, seem to settle this question in favor of defendant's contention. *Childers v. Beaver*, 270 U. S. 555 and *Blanset v. Cardin*, 256 U. S. 319, relied upon by the Government involved the estate of a Quapaw Indian and a construction of the Act of June 25, 1910 (36 Stat. 855) applicable to the Quapaw Indians. This act of Congress, Sec. 33 provides:

"That the provisions of this Act shall not apply to the Osage Indians, nor to the Five Civilized Tribes, in Oklahoma,  
• • • ."

## VIII

The estate in question passed under the intestate laws of the State of Oklahoma and the transfer of said estate is subject to the tax provided in Article 5, Chap. 66, S. L. of Oklahoma, 1935. The Government cannot recover the tax that has been paid to the State of Oklahoma. Judgment is for the defendant.

[fol. 146] The attorney for the defendant will prepare proper decree to be submitted to attorneys for plaintiff and to the Court for approval and entry of judgment on the thirtieth day of December, 1941.

Dated this 18th day of December, 1941.

Eugene Rice, District Judge.

[File endorsement omitted.]

## IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed December 30, 1941

Now on this 30th day of December, 1941, there came on for entry of judgment the above numbered and entitled cause pursuant to regular assignment, and as directed by the Court; the plaintiff, United States of America, appeared by Cleon A. Summers, United States Attorney, and William H. Landram, Assistant United States Attorney for the Eastern District of Oklahoma, and the defendant appeared by F. M. Dudley, Attorney for the Oklahoma Tax Commission of the State of Oklahoma, and no other appearances were made. The Court finds that heretofore the parties have entered into a written stipulation of facts and filed the same in said cause and that no other testimony was introduced. The Court further finds that both parties waived trial by jury and filed in said cause briefs and submitted said case on said briefs and stipulation of facts to the Court; the Court, after having considered the facts and briefs of both plaintiff and defendant, filed in said cause on the 18th day of December, 1941, Findings of Fact and Conclusions of Law.

It Is Therefore Ordered, Adjudged and Decreed by the Court that according to the Findings of Fact and Conclusions of Law filed herein, the defendant, Oklahoma Tax Commission of the State of Oklahoma, have judgment in its favor and judgment is therefore rendered for the defendant, Oklahoma Tax Commission of the State of Oklahoma, [fol. 147] homa, and it is adjudged that the defendant go hence without day; defendant to pay all cost.

Dated this 30th day of December, 1941.

Eugene Rice, District Judge.

OK as to form: Cleon A. Summers, William H. Landram, Attorneys for Plaintiff; F. M. Dudley, Attorney for Defendant.

[File e. Jorsemment omitted.]

**NOTICE OF APPEAL—Filed March 28, 1942**

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit from the final judgment entered in this action on December 30, 1941.

United States of America, by William H. Landram,  
Assistant United States Attorney, Attorney for  
Appellant, Federal Building, Muskogee, Oklahoma.

**Notice of the Filing of Notice of Appeal**

**To: F. M. Dudley, Attorney for Oklahoma Tax Commission, State Capitol Building, Oklahoma City, Oklahoma.**

Please take notice that the United States of America filed in the above styled case on the 28th day of March, 1942, a notice of appeal to the United States Circuit Court of Appeals for the Tenth Circuit.

Dated this 28th day of March, 1942.

John H. Pugh, Clerk, U. S. District Court for the  
Eastern District of Oklahoma, by Broaddus Martin,  
Deputy.

[fol. 148] **STATE OF OKLAHOMA,**  
**County of Muskogee, ss:**

The undersigned, of lawful age, being first duly sworn upon his oath, deposes and states:

That on the 28th day of March, 1942, he enclosed a copy of the above and foregoing notice of appeal and notice of the filing of the notice of appeal in an envelope addressed to F. M. Dudley, Attorney, Oklahoma Tax Commission, State Capitol Building, Oklahoma City, Oklahoma, and after securely sealing said envelope affiant states that he deposited it in the United States Post Office at Muskogee, Oklahoma, on the date aforesaid, and being United States Government mail required no postage.

John H. Pugh, Clerk, U. S. District Court for the  
Eastern District of Oklahoma, by Broaddus Martin,  
Deputy.

Subscribed and sworn to before me this 28th day of  
March, 1942. Eugene Wheeler, Notary Public.  
My commission expires: 9-4-44. (Seal.)

I acknowledge receipt of a copy of the Notice of Appeal from William H. Landram, Assistant United States Attorney for the Eastern District of Oklahoma, attorney for the plaintiff herein.

F. M. Dudley, Attorney for the Defendant Oklahoma Tax Commission.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

STIPULATION DESIGNATING PARTS OF THE RECORD, PROCEEDINGS  
AND EVIDENCE TO BE INCLUDED IN THE RECORD ON APPEAL—  
Filed May 5, 1942

It is stipulated and agreed by and between the plaintiff, United States of America, by William H. Landram, Assistant United States Attorney for the Eastern District of [fol. 149] Oklahoma, and the defendant, Oklahoma Tax Commission, by A. Francis Porta, attorney for said defendant, that the record on appeal in the above numbered and entitled cause shall include the following:

1. Complaint and Exhibits of Plaintiff.
2. Answer of Defendant.
3. Stipulation and agreement filed herein on July 15, 1941.
4. Order admitting certain patents and oil and gas lease into evidence.
5. Findings of Fact and Conclusions of Law.
6. Judgment.
7. Statement of points on which plaintiff intends to rely on appeal.
8. Stipulation designating parts of the record, proceedings and evidence to be included in the record on appeal.
9. Order Extending the Time for Filing the Record on Appeal and Docketing the Action.
10. Notice of Appeal.

Said stipulation and agreement is entered into by authority of Rule 75(f) Rules of Civil Procedure for the District Courts of the United States.

United States of America, Plaintiff, by William H. Landram, Assistant United States Attorney, Attorney for Plaintiff; Oklahoma Tax Commission, Defendant, by A. Francis Porta, Attorney for Defendant.

[File endorsement omitted.]

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[fol. 150] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING THE TIME FOR FILING THE RECORD ON APPEAL AND DOCKETING THE ACTION—Filed May 2, 1942

Now on this 2nd day of May, 1942, for good cause shown, it is ordered that the time for filing the record on appeal and docketing the action is extended for a period of thirty (30) days from the date hereof.

Eugene Rice, Judge.

[File endorsement omitted.]

• • • • •

Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 151] IN UNITED STATES CIRCUIT COURT OF APPEALS

And thereafter the following proceedings were had in said causes in the United States Circuit Court of Appeals for the Tenth Circuit:

#### ORDER OF SUBMISSION

Seventh Day, September Term, Tuesday, September 15th, A. D. 1942. Before Honorable Orie L. Phillips, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

These causes came on to be heard and were argued by counsel, Norman MacDonald, Esquire, appearing for appellant, A. Francis Porta, Esquire, appearing for appellee.

Thereupon these causes were submitted to the court.



## IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—November 13, 1942

Norman MacDonald, Atty., Dept. of Justice (Norman M. Littell, Asst. Atty. Gen., Cleon A. Summers, U. S. Atty., and John F. Cotter, Atty., Dept. of Justice, Were With Him on the Brief) for the United States

A. Francis Porta for appellee.

Before Phillips, Huxman, and Murrah, Circuit Judges

PHILLIPS, Circuit Judge, delivered the opinion of the court:

These cases involve the power of the state of Oklahoma to impose an inheritance tax upon the restricted estates of deceased full-blood Indians.

Lucy Bemore was a full-blood Seminole Indian, enrolled opposite Seminole Roll No. 1563. She died intestate December 23, 1932. She left surviving, her husband, Lewis Bemore, a one-fourth blood Creek Indian, and a son, Thomas, an unenrolled full-blood Seminole Indian, who inherited her estate in equal shares.

Wosey Deere was a full-blood Creek Indian, enrolled opposite Creek Roll No. 9546. She died September 2, 1938. She left surviving, her husband, Milford Thomas, a seven-eighths blood Cherokee Indian, and two daughters and one son, all full-blood Creek Indians, to whom her estate passed. [fol. 152] Nitey was a full-blood Seminole Indian, enrolled opposite Seminole Roll No. 1446. She died August 17, 1930. She left a will devising and bequeathing her estate, in equal shares, to her five surviving full-blood Seminole children.

Each of the three deceased Indians, respectively, at the time of her death was domiciled in and a resident of the state of Oklahoma. Oklahoma assessed an inheritance tax upon the transfer of each of their estates. The Secretary of the Interior paid the amount of each tax under protest, and the United States brought these actions pursuant to the provisions of 68 O. S. A. §1475, to recover the amounts paid, with interest.

Each of the deceased Indians died seized of lands, restricted against alienation, being homestead and surplus allotments or lands purchased with restricted funds title to

which was taken under a restricted form of deed, and personal property and cash held as trust funds in the custody and control of the Secretary of the Interior.

From judgments denying each of the several claims, the United States has appealed.

Under the first proviso of §9 of the Act of May 27, 1908, 35 Stat. 315, restricted lands of allottees of the Five Civilized Tribes which passed by inheritance to full-blood Indian heirs remained subject to qualified restrictions. Under the amendment of April 12, 1926, 44 Stat. 239, lands passing to a full-blood Indian of the Five Civilized Tribes by devise are also subject to such qualified restrictions.<sup>1</sup> Hence, the lands which passed by inheritance to the full-blood heirs of Bemore and Deere and by devise to the full-blood devisees of Nitey remained subject to qualified restrictions.<sup>2</sup>

Sec. 23 of the Act of April 26, 1906, 34 Stat. 137, 145, as amended by §8 of the Act of May 27, 1908, 35 Stat. 312, 315, [fol. 153] authorized a member of the Five Civilized Tribes to devise and bequeath all of his estate, real and personal, including his restricted allotments, without restriction or condition, but provided that a will of a full-blood Indian devising real estate should not be valid if it disinherited the "parent, wife, spouse, or children" of such full-blood Indian, unless it was acknowledged before and approved by a judge of the United States Court for the Indian Territory, a United States Commissioner, or a judge of a county court of the state of Oklahoma.<sup>3</sup>

Ch. 162, O. S. L. 1915 (O. S. 1931, 12469), applicable to the Bemore estate, in part reads:

"A tax is hereby laid upon the transfer to persons . . . of property . . . ."

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<sup>1</sup> *Whitchurch v. Crawford*, 10 Cir., 92 F. 2d 249, 251; *Burgess v. Nail*, 10 Cir., 103 F. 2d 37, 42.

<sup>2</sup> *Parker v. Richard*, 250 U. S. 235, 238; *United States v. Gypsy Oil Co.*, 8 Cir., 10 F. 2d 487, 489; *Holmes v. United States*, 10 Cir., 53 F. 2d 960, 961; *United States v. Mid-Continent Petroleum Corp.*, 10 Cir., 67 F. 2d 37, 42; *Commissioner v. Owen*, 10 Cir., 78 F. 2d 768, 775; *Glenn v. Lewis*, 10 Cir., 105 F. 2d 398, 400.

<sup>3</sup> See *Wilson v. Greer*, 50 Okl. 387, 151 P. 629, 630.

“First: By will or the intestate laws of this state; \* \* \*

Ch. 66, Art. 5, O. S. L. 1935, applicable to the Deere and Nitey estates, in part reads as follows:

“A tax is hereby levied upon the transfer of the net estate of each decedent, \* \* \* to persons, \* \* \* by will or the intestate laws of this state, \* \* \*

There is nothing in the treaties or acts of Congress which expressly exempts estates of members of the Five Civilized Tribes from the imposition of an inheritance tax.<sup>4</sup> Congress has not expressly consented to the imposition of such a tax.

The United States contends that the property passed, not under the laws of Oklahoma and not with Oklahoma's permission, but under federal law, and that the restricted estates were federal instrumentalities and not subject to tax by the state without the assent of the Federal government.

The Oklahoma Enabling Act of June 16, 1906, 34 Stat. 267, § 21 provides that:

“\* \* \* all laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said State, except as modified [fol. 154] or changed by this Act or by the constitution of the State, and the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States.”

By § 1 of the Oklahoma Enabling Act, 34 Stat. 267, Congress provided that nothing contained in the constitution of Oklahoma should be construed to limit or impair “the rights of persons or property pertaining to the Indians” within Oklahoma or to limit or affect the authority of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise.

Sec. 2 of the Schedule of the Oklahoma Constitution<sup>5</sup> provides that “All laws in force in the Territory of Oklahoma at the time of the admission of the State into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and re-

<sup>4</sup> Landman v. Commissioner, 10 Cir., 123 F. 2d 787.

main in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law."

By the Act of April 28, 1904, 33 Stat. 573, § 2, Congress declared that all laws of Arkansas theretofore put in force in the Indian Territory should be taken "to embrace all persons and estates in said Territory, whether Indian, freedmen, or other wise." The adoption of the Arkansas law was intended to be merely provisional.<sup>5</sup> The provisions of the Enabling Act above quoted substituted the Oklahoma law of descent for that of Arkansas theretofore put in force in the Indian Territory.<sup>6</sup>

In *Childers v. Beaver*, 270 U. S. 555, 559, involving the power of the state of Oklahoma to impose an inheritance tax upon the transfer of the restricted estate of a deceased Quapaw Indian, the court said:

"Congress provided that the lands should descend and directed how the heirs should be ascertained. It adopted [fol. 155] the provisions of the Oklahoma statute as an expression of its own will—the laws of Missouri or Kansas, or any other State, might have been accepted. The lands really passed under a law of the United States, and not by Oklahoma's permission.

"It must be accepted as established that during the trust or restrictive period Congress has power to control lands within a State which have been duly allotted to Indians by the United States and thereafter conveyed through trust or restrictive patents. This is essential to the proper discharge of their duty to a dependent people; and the means or instrumentalities utilized therein cannot be subjected to taxation by the State without assent of the federal government."

In *Childers v. Pope*, —Okl.—, 249 P. 726, 728, the Supreme Court of Oklahoma said:

"We therefore must hold that the real estate and the mineral interests in this case were cast under the law of the United States, which adopted the Oklahoma Statute.  
• • • We are of the opinion that the inheritance tax is

<sup>5</sup> *Shulthis v. McDougal*, 225 U. S. 561, 571;  
*Jefferson v. Fink*, 247 U. S. 288, 292.

<sup>6</sup> *Jefferson v. Fink*, 247 U. S. 288, 294.

<sup>7</sup> See, also, *Childers v. Pope* — Okl. —, 249 P. 726.

authorized to be assessed, levied, and collected by the state or the United States, and the authority is given for the privilege of allowing or authorizing a party to transmit by a will, deed, or conveyance to be operative after the death of decedent, or by operation of law in case of an intestate decedent, under the laws of descent and distribution applicable to the transfer of said estate. \* \* \* Under the Beaver Case, it being held that the real property passed by permission of the laws of the United States, and not by Oklahoma law, then, no inheritance tax can be collected by plaintiff against the allotment, inherited lands, or tribal mineral interests of the deceased."

The power to assess an inheritance tax rests on the principle that since the rights to receive or transmit property are not natural rights, but are creatures of the legislature, [fol. 156] they are completely subject to taxation and control by the authority which created them.\*

Under the holding in *Childers v. Beaver*, *supra*, and *Childers v. Pope*, *supra*, in the instant cases, the rights of the deceased Indians to transmit the property, and the rights of the heirs and beneficiaries to receive such property, flowed not from state laws as such, but from laws of the United States, and the property passed with the permission of the United States rather than with Oklahoma's permission. It follows that Oklahoma may not impose an

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\* *People v. McCormick*, 327 Ill. 547, 158 N. E. 861, 864; *Stebbins v. Riley*, 268 U. S. 137, 140;

*Chanler v. Kelsey*, 205 U. S. 466 (dissenting opinion of Mr. Justice Holmes, pp. 479, 480);

*In re Anderson's Estate*, — Iowa —, 218 N. W. 140, 142;

*In re Fish's Estate*, 219 Mich. 369, 189 N. W. 177, 178, 179;

*Strauss v. State*, 36 N. D. 594, 162 N. W. 908, 909;

*In re Watson's Estate*, 226 N. Y. 384, 123 N. E. 758, 761;

*In re Shepherd's Estate*, 271 N. Y. S. 120, 122;

*In re Dillingham's Estate*, — Cal. 238 P. 367, 370;

*State v. Walker*, — Mont. —, 226 P. 894, 896;

*In re Heck's Estate*, — Ore. —, 250 P. 735, 737;

*In re Sherwood's Estate*, 122 Wash. 648, 211 P. 734, 737.

inheritance tax upon the passing of the estates herein involved.

It is true that the instrumentality doctrine, as applied to restricted lands of Indians, has been limited by the decision of the Supreme Court of the United States in *Helvering v. Mountain Producers Corporation*, 303 U. S. 376, 383-387, which expressly overruled the *Coronado* and *Gillespie Cases*,<sup>9</sup> but *Childers v. Beaver*, *supra*, has not been overruled, and this court is still bound by that decision.

Restricted Indians in Oklahoma enjoy the privileges and protection of local laws. The local courts are open to them for the redress of grievances. The estates of deceased members of the Five Civilized Tribes are administered in the county courts of Oklahoma. Their wills are probated and their heirs determined in such courts. Members of the Five Civilized Tribes are citizens of Oklahoma<sup>10</sup> and enjoy the privileges and benefits of that citizenship. It would seem [fol. 157] to the writer of this opinion that the Enabling Act should be construed as consenting to the application of the local law of Oklahoma with respect to the devolution of property of Indians who are domiciled in and residents of that state, and that such property should be regarded as passing under the laws of Oklahoma and subject to inheritance tax by Oklahoma, but that view could only prevail if *Childers v. Beaver*, *supra*, were overruled. Whether it shall stand or be overruled, only the Supreme Court of the United States may decide.

The judgments are Reversed and the causes Remanded, with instructions to enter judgments for the amount of the tax paid on the transfer of each estate, with interest at three per cent per annum from the date of the respective payments.

MURRAH, dissenting.

Admittedly, there is no inhibition against the asserted power of the State of Oklahoma to tax the transmission of the Indian estates here involved, if the property passes under the laws of the State of Oklahoma, but the majority hold that the Indian estates here involved pass under Fed-

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<sup>9</sup> *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393; *Gillespie v. Oklahoma*, 257 U. S. 501.

<sup>10</sup> *Palmer v. Cully*, 52 Okl. 454, 153 P. 154, 157.



eral law and not under the laws of Oklahoma. This conclusion is reached by force of *Childers v. Beaver*, 270 U. S. 555, which considered the same question under an entirely different Federal statute relating to the disposition of Indian estates. The Act of June 25, 1910, 36 Stat. 855, as amended February 14, 1913, 37 Stat. 678, upon which *Childers v. Beaver*, *supra*, is predicated, relates to Indians other than members of the Five Civilized Tribes, and specifically exempts from its application members of those tribes.

Under the express provisions of this Act, *supra*, "it was the duty of the Secretary of the Interior to determine the heirs according to the state law of descent", but Congress provided how the lands should descend and directed how the heirs should be ascertained. The law of descent in Oklahoma is applicable only insofar as it is made a criterion for the guidance of the Secretary of the Interior, whose administrative duty it is to approve the execution of a will [fol. 158] by an Indian ward, or to disapprove the same without regard to the law of Oklahoma. It is only after the disapproval of the will that the Secretary of the Interior is directed to determine heirship in accordance with the laws of Oklahoma. In no event does the law of Oklahoma have any operation or effect upon the execution of the will or the validity thereof. Neither are the courts of Oklahoma utilized to determine heirship in the event its laws become relevant. But the determination of heirship is an administrative function entrusted to the Secretary of the Interior, guided by local law. The probate courts of Oklahoma have no jurisdiction over the will or the determination of the heirship. *Blanset v. Cardin*, 256 U. S. 319; *Hanson v. Hoffman*, 113 F. 2d 780.

But with respect to members of the Five Civilized Tribes, the Congressional policy as expressed by numerous statutes is entirely different. The history relating to the application of the laws of Oklahoma to the Five Civilized Tribes, including the law of descent, is well stated by the majority and need not be repeated here. It is sufficient to say that long prior to statehood, the prevailing law in the Indian Territory was applicable uniformly to the Indian as well as the white man. The Indian citizen was equally entitled to its protection and equally amenable to its processes.

With exceptions not material here, a member of the Five Civilized Tribes is authorized to dispose of his or her estate on the same footing as any other citizen. They are author-

ized to dispose of their estates by will in accordance with the laws of Oklahoma and not in derogation thereof. The law of Oklahoma is not merely a guide or criterion, but it creates the right and provides the means and manner of disposition. *Jefferson v. Fink*, 247 U. S. 288; *Blundell v. Wallace*, 267 U. S. 373; see also *Caesar v. Burgess*, 103 F. 2d 503.

In my judgment, the valid distinction made clear by a comparison of *Blanset v. Cardin*, *supra*, and *Blundell v. Wallace*, *supra*, furnishes the basis for the denial of the taxing power of the state in *Childers v. Beaver*, *supra*, and the sanction of that power under the attendant circumstances. In *Blanset v. Cardin*, *supra*, the property was transmitted under and by virtue of an Act of Congress [fol. 159] which provided the means and manner by which the property would pass, and its passing depended upon the ministrative determination of the Secretary of the Interior, and not the courts of Oklahoma. The law of Oklahoma had relevancy only as a guiding principle which acted only by force of the administrative agency empowered to administer it. While in *Blundell v. Wallace*, *supra*, the laws of Oklahoma and the courts which interpreted them were made the arbiters of the right to direct the testamentary disposition, and the law of descent determined its disposition. As respects members of the Five Civilized Tribes, the right to dispose of their property by will is created by the law of Oklahoma. The executed will is valid according to Oklahoma law and it is enforceable only in the courts of that state. In the absence of a will, the right to inherit is created by Oklahoma law and is enforceable in its courts and not elsewhere or otherwise. Therein lies the incidence of the tax and power to enforce it.

It is true that the laws of Oklahoma are made applicable and control the disposition of the property in virtue of a Congressional will, but I do not suppose that because the state law is made operative by will of Congress that the force of the law is any more impotent than if it had been derived from any other source from which the state exercises its sovereign powers.

Here the State of Oklahoma has by the force of its uniform laws as a sovereign state afforded a protection and conferred benefits for which it may exact a uniform tax. These estates are not tax-free instrumentalities of the Federal government, and the Federal government may and has

exacted a similar tax. *Landman v. Commissioner*, 123 F. 2d 787. The state act imposing the tax does not expressly or inferentially exempt from its scope the transmission of Indian estates. Neither has the Federal government expressly or inferentially exercised its indubitable power to exempt the transmission of the estates from the scope of the state taxing act. Nothing stands in the way of the exaction of the tax except the question of whether the property passes under the laws of the state. In my judgment, it does and the tax should be sustained.

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[fol. 160] IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT, CASE No. 2558—November 13, 1942

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed; that this cause be and the same is hereby remanded to the said district court with instructions to enter judgment for the amount of the tax paid, with interest at three percent per annum from the date of payment; and that United States of America, appellant, have and recover of and from Oklahoma Tax Commission of the State of Oklahoma, appellee, its costs herein and have execution therefor.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT, CASE No. 2559—November 13, 1942

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed; that this cause be and the same is hereby remanded to the said district court with instructions to enter judgment for the

amount of the tax paid, with interest at three percent per annum from the date of payment; and that United States of America, appellant, have and recover of and from Oklahoma Tax Commission of the State of Oklahoma, appellee, its costs herein and have execution therefor.

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[fol. 161] IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT, CASE No. 2560—November 13, 1942

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed; that this cause be and the same is hereby remanded to the said district court with instructions to enter judgment for the amount of the tax paid, with interest at three percent per annum from the date of payment; and that United States of America, appellant, have and recover of and from Oklahoma Tax Commission of the State of Oklahoma, appellee, its costs herein and have execution therefor.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER GRANTING STAY OF MANDATES—December 9, 1942

These causes came on to be heard on the motion of appellee for a stay of the mandates herein and were submitted to the court.

On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted; that no mandates of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under Section 3 of Rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the cases by the Supreme Court.

[fol. 162] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 163] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 623

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed February 15, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Clerk's note: Similar orders were entered in Nos. 624 and 625.

(5047)

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**In the Supreme Court of  
the United States**

OCTOBER TERM, 1942.

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**NO. . . . .**

OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,  
*Petitioner,*  
VERSUS  
UNITED STATES OF AMERICA,  
*Respondent.*

---

**NO. . . . .**

OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,  
*Petitioner,*  
VERSUS  
UNITED STATES OF AMERICA,  
*Respondent.*

---

**NO. . . . .**

OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,  
*Petitioner,*  
VERSUS  
UNITED STATES OF AMERICA,  
*Respondent.*

---

**PETITION FOR WRITS OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE TENTH CIRCUIT, AND BRIEF IN  
SUPPORT THEREOF**

---

A. FRANCIS PORTA,  
W. A. BARNETT,  
C. W. KING,  
*Attorneys for Petitioner.*

A. L. HERR,  
*Of Counsel.*  
December, 1942.



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**In the Supreme Court of the United States**

OCTOBER TERM, 1942.

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**NO. ....**

---

OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,  
*Petitioner,*

**VERSUS**  
UNITED STATES OF AMERICA,  
*Respondent.*

---

**NO. ....**

---

OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,  
*Petitioner,*

**VERSUS**  
UNITED STATES OF AMERICA,  
*Respondent.*

---

**NO. ....**

---

OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,  
*Petitioner,*

**VERSUS**  
UNITED STATES OF AMERICA,  
*Respondent.*

---

**PETITION FOR WRITS OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE TENTH CIRCUIT, AND BRIEF IN  
SUPPORT THEREOF**

---

**PETITION FOR WRITS OF CERTIORARI**

*To the Chief Justice and Associate Justices of the Supreme  
Court of the United States:*

Oklahoma Tax Commission of the State of Oklahoma,  
your petitioner herein, being aggrieved of judgments of  
the United States Circuit Court of Appeals for the Tenth

Circuit entered the 13th day of November, 1942, in Causes Nos. 2558, 2559, and 2560, styled *United States of America, Appellant, v. Oklahoma Tax Commission of the State of Oklahoma, Appellee*, respectfully petitions review thereof upon the issues of law hereinafter stated, praying writs of certiorari for the purpose, and as cause and grounds therefor respectfully shows:

## I

### Statement of Matter Involved

Petitioner is a body created by the laws of the State of Oklahoma, and is charged with the duty of collecting the state and inheritance taxes due the State of Oklahoma. Respondent, United States of America, prosecutes this action in its own behalf and in behalf of the estates of Lucy Bemore, a deceased full-blood Seminole Indian, Nitey, a deceased full-blood Seminole Indian, and Wosey Deere, a deceased full-blood Cherokee Indian. Petitioner assessed an inheritance tax against the estates of each and all of said deceased Indian estates, which tax was paid by the Secretary of Interior under protest. The United States of America then brought its three separate actions in the District Court of the United States for the Eastern District of Oklahoma to recover the tax so paid. The action was brought under provisions of Title 68, Oklahoma Statutes, 1941, Section 1475, Title 68, Oklahoma Statutes Annotated, Section 1475.

Case No. 2558 relates to the estate of Lucy Bemore, deceased. Lucy was a full-blood Seminole Indian, enrolled as such opposite Seminole Roll No. 1563. She died intestate

December 23, 1932, while a resident of the State of Oklahoma. She left surviving, her husband, Lewis Bemore, a one-fourth ( $\frac{1}{4}$ ) blood Creek Indian, and her son, Thomas, an unenrolled Seminole Indian, who inherit her estate in equal parts. At the time of her death, she owned an estate of the gross value of \$264,212.18, which estate was valued by the Oklahoma Tax Commission, for inheritance tax purposes, at the net value of \$250,630.77, upon which the Oklahoma Tax Commission assessed an inheritance tax of the sum of \$5,925.20. Said gross estate consisted of the homestead and surplus allotment of said deceased, also forty-three (43) acres of land purchased for her out of restricted funds of said deceased, title to which was taken in her name on a restricted form deed. Said real estate was of the gross value of \$13,000.00 at the time of her death. She also owned at the time of her death, mineral leases in the sum of \$46,204.04, executed on her surplus and homestead allotments, and cash credits in the sum of \$205,008.14, which cash credits represented proceeds from the sale of oil and gas derived, produced from the lands purchased for her, above stated. All of the above lands at the time of her death were restricted from alienation and encumbrance. The Secretary of Interior never at any time issued any instrument removing restrictions on said lands, nor any part thereof.

A certificate designating both the homestead and surplus allotment of said deceased as tax exempt was duly filed for record in the office of the County Clerk of Seminole County, Oklahoma, and was exempt from taxation at the time of her death.



Case No. 2559 relates to the estate of Nitey, who is also a full-blood Seminole Indian. She died testate, August 17, 1913, a resident of the State of Oklahoma. By her Will, she devised her estate to her five surviving full-blood Seminole children in equal shares. Her gross estate at the time of her death was valued at the sum of \$752,751.97, and was valued by the Oklahoma Tax Commission for inheritance tax purposes at the net value of \$677,593.38. Her estate consisted of a homestead allotment of forty (40) acres and her surplus allotment of two hundred (200) acres, of the value of \$32,078.00; United States Treasury Bonds credited to her account at the time of her death in the sum of \$203,812.50, interest accrued on the bonds in the sum of \$881.25; cash credited to her account in the sum of \$513.380.22; and household goods and a truck, valued at \$2,600.00. The cash credited resulted from the sale of oil and gas derived from production upon her homestead and surplus allotments, and was at the time of her death under the exclusive control and supervision of the Secretary of Interior. Upon the net value of her estate, the Oklahoma Tax Commission assessed an inheritance tax in the sum of \$16,053.74. The Secretary of Interior never at any time issued any instrument removing restrictions from said lands, nor any part thereof, and said lands remained restricted from alienation or encumbrance at the time of her death.

A certificate designating one-hundred-sixty (160) acres of Nitey's land, being her homestead, and one-hundred-twenty (120) acres of surplus land, as tax exempt, was duly filed for record in the office of the County Clerk

of Seminole County, Oklahoma, and was exempt from taxation at the time of her death.

Case No. 2560 relates to the estate of Wosey Deere, a full-blood Creek Indian, enrolled as such opposite Creek Roll No. 9546. She died intestate September 2, 1938, while a resident of the State of Oklahoma. Her estate was inherited by her husband, Milford Thomas, a seven-eighths ( $\frac{7}{8}$ ) blood Creek Indian; two daughters and one son, all full-blood Creek Indians. She owned an estate at the time of her death of the gross value of \$359,643.45, which estate was valued by the Oklahoma Tax Commission, for inheritance tax purposes, at the net value of \$318,794.07, upon which estate the Oklahoma Tax Commission assessed an inheritance tax in the sum of \$14,908.67. The estate consisted of her homestead and surplus allotments; one-hundred-sixty (160) acres inherited from her grandfather, and also a four-fifths ( $\frac{4}{5}$ ) interest in eighty (80) acres of land in Section Two (2), Township Fourteen (14) North, Range Seven (7) East, Creek County, Oklahoma; United States Treasury Bonds, the accrued interest on the bonds, which bonds were derived from the proceeds derived from the sale of oil produced from her allotted lands, and were at the time of her death under the exclusive control of the Secretary of Interior; also cash credits under the control of the Secretary of Interior derived from the same source; and small items of other personal property which was also at all times under the control and custody of the Secretary of Interior. That all of said property was restricted, and remained restricted in the hands of the heirs of Wosey Deere. The Secretary of Interior never at any time, by any instru-

ment removed the restrictions on the land of said deceased, nor any part thereof, and such land was restricted from alienation and encumbrance at the time of her death.

A certificate designating one-hundred-sixty (160) acres of said decedent's lands, being the homestead, and surplus allotment of said deceased as tax exempt was duly filed for record in the office of the County Clerk of Creek County, Oklahoma, and was exempt from taxation at the time of her death.

The estate of Lucy Bemore, deceased, was assessed under the provisions of Section 12469, Oklahoma Statutes, 1931, Chapter 162, Oklahoma Session Laws, 1915, which is as follows:

"A tax is hereby laid upon the transfer to persons or corporations of property or any interest therein or income therefrom.

"When the transfer is of tangible property in this state made by any person, or of intangible property made by a resident of this state at time of transfer:

"First: By will or the intestate laws of this state;

"Second: By deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death;

"Third: When the transferee becomes beneficially entitled in possession or expectancy by any such transfer whether made before or after the passage of this Act. Said tax shall be upon the clear market value of such property."

The tax against the estates of Nitey and Wosey Deere, deceased, was assessed under the provisions of Section 1, Art. 5, Chap. 66, Sess. Laws 1935, which is as follows:

"A tax is hereby levied upon the transfer of the net estate of every decedent, whether in trust or otherwise, to persons, associations, or corporations, of property, real, personal or mixed, whether tangible or intangible, or any interest therein or income therefrom, by will or the intestate laws of this state, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death, whether made before or after the passage of this Act. Such tax shall be imposed upon the value of the net estate and transfers at the rates, under the conditions, and subject to the exemptions and limitations hereinafter prescribed."

These assessments, as before stated, were paid under protest by the Secretary of Interior, and three separate actions brought in the United States District Court for the Eastern District of Oklahoma, to recover the tax so paid. The cases were submitted to the trial court under a stipulation of facts. The respondent, United States of America, pitched its suits:

1. Upon the theory that the devolution of the estates was cast under the laws of the United States, and not under the laws of the State of Oklahoma.
2. That the taxes laid constituted a direct burden upon a governmental instrumentality.

The trial court decided these issues against the respondent. Appeals were taken by respondent to the United States Circuit Court of Appeals for the Tenth Circuit, which

Court reversed the judgments of the trial court and remanded the causes to the United States District Court of the Eastern District of Oklahoma, with instructions to enter judgment in favor of the plaintiff. The cases were consolidated upon appeal. (Tr. 3.)

## II

### Jurisdiction

The original jurisdiction of the Federal Court in this cause is based on Section 24, Judicial Code, as Amended, Title 28, U. S. C. A., Section 41.

Jurisdiction of this Court to review the judgment of the Circuit Court of Appeals is claimed under the provisions of Subdivision (a) of Sec. 347 of Tit. 28, U. S. C. A., being Sec. 240 of the Judicial Code, as amended. This review is sought by writ of certiorari.

The statutes of Oklahoma under which the assessment was laid, and the validity thereof as applied to the estates here involved, consists of:

"Section 12469, Oklahoma Statutes 1931:

"Section 1, Article 5, Chapter 66, Session Laws 1935, *supra*."

The applicability of the above sections of the statutes and the right of the Oklahoma Tax Commission to assess inheritance tax against the estates here involved thereunder was directly raised and put in issue by the pleadings and stipulation of facts, and was raised in the Circuit Court of Appeals for the Tenth Circuit, which Court decided the

issues adversely to the contention of the petitioner. The judgment of the Circuit Court of Appeals for the Tenth Circuit, which this petitioner seeks to review, was entered on the 13th day of November, 1942.

A copy of the opinion of the Circuit Court of Appeals is found in this transcript, beginning at page 151. The dissenting opinion is found beginning at page 157.

### III

#### Questions Presented

The review prayed for by this petition will present the following questions:

(1) Did the right of the deceased Indian allottees to transmit their estates upon their death, and the right of their heirs or beneficiaries to receive the same, flow from a law of the United States of America, or from the laws of the State of Oklahoma?

(2) Does the tax, as laid against the estates in the instant cases, constitute a direct burden upon a governmental instrumentality?

(3) The case of *Childers v. Beaver*, 270 U. S. 559, is not applicable to the facts in this case, but is distinguished upon the ground fully to be set forth in supporting brief.

(4) If the case of *Childers v. Beaver*, *supra*, be held applicable, the petitioner will contend that said case should no longer be followed, but should now be definitely overruled.



(5) The Supreme Court of this State, in the case of *Childers v. Pope*, 119 Okla. 300, 249 Pac. 726, reached an erroneous conclusion, and should not be followed by this Court.

#### IV

#### Reasons for Allowance of the Writ

Petitioner, as reasons for allowance of the writ of certiorari, proposes the following:

(1) The Circuit Court of Appeals has decided an important question of Federal Law which has not been heretofore decided, but should be decided and settled by this Court, the question being:

"Does the transfer of the estates of deceased full-blood Indians of the Five Civilized Tribes, upon the death of a full-blood member of such tribe, take place under and by virtue of the laws of the United States of America, or under and by virtue of the laws of the State of Oklahoma?"

(2) The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with decisions of this Court in the cases of:

*Jefferson v. Fink*, 247 U. S. 288.

*Blundell v. Wallace*, 267 U. S. 373.

(3) The rule announced by this Court in the case of *Childers v. Beaver*, 270 U. S. 555, if held applicable to the facts in this case, should now be reconsidered and overruled.

Wherefore, petitioner prays that writ of certiorari shall issue, addressed to United States Circuit Court of

Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court for review and determination, a full and complete transcript of the records and all of its proceedings in said Causes Nos. 2558, 2559, and 2560, entitled *United States of America, Appellant, v. Oklahoma Tax Commission of the State of Oklahoma, Appellee*, and that upon such writ and review, the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, made and entered on the 13th day of November, 1942, in the above designated causes, shall be reversed, and that the judgment of the trial court, the United States District Court for the Eastern District of Oklahoma, be affirmed. Petitioner further prays that it shall have such other and further relief in the premises to which this Court shall find it duly entitled.

A. FRANCIS PORTA,

W. A. BARNETT,

C. W. KING,

*Attorneys for Petitioner.*

A. L. HERR,  
Of Counsel.

December, 1942.

**BRIEF IN SUPPORT OF PETITION**

(Emphasis Supplied.)

The facts are fully set forth in our petition for allowance of the writ and we deem it unnecessary to here repeat the same.

The question herein involved concerns the right and power of the State of Oklahoma to assess an inheritance tax against the transfer of the estates of full blooded restricted deceased Indians, members of the Five Civilized Tribes.

Petitioner asserts the right so to do. Protestants contest such right and in the trial court based their protest on two propositions:

1. The devolution and transfer of the estates are governed and controlled by the laws of the United States of America and not by the laws of the State of Oklahoma.

2. The tax as laid constitutes a direct burden upon a governmental instrumentality.

The trial court decided the issues in favor of petitioner. The Circuit Court of Appeals for the Tenth Circuit, on appeal, reversed the judgment of the trial court, that court holding that the devolution and transfer of the estates was governed by the laws of the United States of America, and not by the laws of the State of Oklahoma. It based its conclusions on the decision of this Court in the case of *Childers v. Beaver*, 275 U. S. 555, and the decision of the Supreme Court of the State in the case of *Childers v. Pope*, 119 Okla. Rep. 300, 249 Pac. 726.

It is the contention of petitioner that the devolution and transfer of these estates are governed by the laws of the State of Oklahoma, and that the State, therefore, has authority to assess an inheritance tax upon such transfers; that the cases, *Childers v. Beaver*, and *Childers v. Pope*, are not applicable but if held applicable, should no longer be followed.

We will present our argument in support of our contention upon three propositions:

1. The devolution and transfer of estates herein involved are governed and controlled by the laws of the State of Oklahoma and not by the laws of the United States of America.

2. The decisions in the cases of *Childers v. Beaver* and *Childers v. Pope*, *supra*, are not applicable. If held applicable, they should no longer be followed.

3. The tax as laid does not so constitute a direct burden upon a governmental instrumentality.

*Proposition No. 1*

The devolution and transfer of the estates herein involved are governed and controlled by the laws of the State of Oklahoma and not by the laws of the United States of America.

In discussing this proposition we concede that Congress has a right to control the devolution and transfer of the estates of full blood Indians; and that it has a right to deny a state the power to assess an inheritance tax upon the transfer of such estates. It is our contention, however, as applied to estates of full blood Indians of the Five Civilized Tribes in Oklahoma, it has never assumed to exercise such power.

Prior to the time the Federal Government adopted the policy of allotting the lands of the Five Civilized Indian Tribes in severalty to the members thereof, Congress had passed no Act governing the devolution or transfer of such estates.

Prior to that time such estates descended according to tribal laws and usage and custom of the Tribes. The first Act passed by the Congress touching this question, so far as we are aware, was the Act of May 2, 1890, 26 Stat. 81. The lands of the Five Civilized Tribes, at that time, were located in the territory composing the Indian Territory.

By that Act Congress put in force in the Indian Territory several Statutes of the State of Arkansas, including Chapter 49 of Mansfield's Digest, relating to descent and distribution. By its Act of April 28, 1904, 33 Stat. 573, Sec-

tion 2, Congress continued in force such laws and somewhat extended their operation. This Section of the Act provides:

"All of the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation so as to embrace all persons and estates in said Territory, whether Indians, Freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the District Court in said Territory in the settlement of all estates of decedents, the guardianship of minors and incompetents, whether Indians, Freedmen or otherwise."

Thereafter, and in allotting the lands in severalty to the Indian members thereof, Congress, in each allotment Act inserted a provision that the land so allotted should descend according to the law of descent and distribution of the State of Arkansas. See Sec. 6, Act June 30, 1902, as applied to Creeks; and Sec. 2, Act June 2, 1900, as applied to Seminoles.

This in brief constitutes the history of Congressional legislation upon the devolution of the estates of full blood Indians prior to the admission of the Territory into the Union as a State.

The Indian Territory and Oklahoma Territory were admitted into the Union as a single State on November 16, 1907, under the Act of Congress of June 16, 1906, 34 Stat. 267, authorizing such admission, commonly known as the Enabling Act. Section 21 of this Act in part provides:

"\* \* \* and all laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said State, ex-



cept as modified or changed by this Act or by the Constitution of the State, and the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States."

Upon the adoption of this Act and the admission of the State into the Union the laws of the State of Oklahoma relating to descent and distribution, became laws of the State. Such laws insofar as they relate to the estates of the Five Civilized Tribes are now laws of the State. Their estates are administered under and by virtue of the laws of the State and the heirs are determined under the provision of such laws. The devolution of their estates are governed by such laws and the State has therefore a right to assess an inheritance tax upon the transfer of such estates. This position is sustained by this Court in the case of *Jefferson v. Fink*, 247 U. S. 288. The Court, among other things, there said:

"The State was admitted to the Union November 16, 1907; and thereupon the laws of the Territory of Oklahoma relating to descent and distribution (Rev. Stats. Okla. 1903, c. 86, art. 4) *became laws of the State*. Thereafter Congress, by the Act of May 27, 1908, c. 199, 35 Stat. 312, s. 9, *recognized and treated 'the laws of descent and distribution of the State of Oklahoma as applicable to the lands allotted to members of the Five Civilized Tribes.'*"

The Court had there under consideration the question as to whether upon the death of a full blood Creek Indian after the admission of the State into the Union, his estate descended according to the laws of descent and distribution of the State of Oklahoma or under the laws of descent and distribution of the State of Arkansas. The Court held that

the descent was cast under the laws of the State of Oklahoma and in so doing definitely held that when the State was admitted into the Union the laws of descent and distribution of the Territory of Oklahoma became the *Laws of the State*. While the Court in the above case did not have under consideration the identical question herein involved, we think the case applicable here.

We also think the case of *United States v. Pridgeon*, 153 U. S. 48, applicable. In that case, Congress by its Act of May 2, 1890, placed in force in Oklahoma Territory certain provisions of the Criminal Code of Nebraska. Such code contained a section making horse stealing a separate offense. One of the questions presented in the case was whether the violation of this section constituted a violation of a law of the United States of America or whether it constituted a violation of the law of the Territory of Oklahoma.

The Court held it constituted a violation of the law of the Territory of Oklahoma and in so doing, among other things, said:

"But it is suggested on behalf of the United States that the provisional and temporary adoption by Congress of the Nebraska Criminal Code for the Territory of Oklahoma had the effect of making larceny or horse stealing an offense against the United States, punishable on the federal side of the courts of the territory. The Supreme Court of the Territory has held that the Criminal Code of Nebraska, established by Congress, was to be treated as if it had been enacted by the territorial legislature, and was to be dealt with as if the crimes thereby declared were crimes, not against

the United States, but against the territory. Thus, in *Ex parte Larkin*, 1 Okla. 53, 57, 25 Pac. 745, GREEN, C. J., says: 'It was intended by Congress that the laws of Nebraska should constitute a territorial code, as distinguished from the laws of the United States in force in the Territory of Oklahoma, and that they should sustain the same relations to the courts and to the people of the territory, and to the legislative assembly, as a code of laws enacted by the legislative assembly.'

We think what is there said is peculiarly applicable to the case at bar. When Congress, by the Enabling Act, put in force in the new state the laws of descent and distribution of the State, it was intended that said laws should constitute state laws as distinguished from the laws of the United States. See also the case of *Blundell v. Wallace*, 267 U. S. 374.

We think these cases, by analogy at least sustain our contention that the devolution of the Indian estates herein involved are governed by the laws of the State of Oklahoma rather than by the laws of the United States of America. This view undoubtedly conforms to the individual views of the majority of the Circuit Court of Appeals, as may be seen by reference to the closing paragraph of the opinion in that case wherein the Court said:

"Restricted Indians in Oklahoma enjoy the privileges and protection of local laws. The local courts are open to them for the redress of grievances. The estates of deceased members of the Five Civilized Tribes are administered in the county courts of Oklahoma. Their wills are probated and their heirs determined in such courts. Members of the Five Civilized Tribes are citi-

zens of Oklahoma and enjoy the privileges and benefits of that citizenship. It would seem to the writer of this opinion that the Enabling Act should be construed as consenting to the application of the local law of Oklahoma with respect to the devolution of property of Indians who are domiciled in and residents of that State, and that such property should be regarded as passing under the laws of Oklahoma and subject to inheritance tax by Oklahoma, but that view could only prevail if *Childers v. Beaver, supra*, were overruled. Whether it shall stand or be overruled, only the Supreme Court of the United States may decide." (Tr. 156.)

It is thus apparent, had this matter been submitted to the Circuit Court of Appeals, as an original proposition, that Court would have sustained the power of the State to assess the tax. We think, however, the Court was in error in holding the case of *Childers v. Beaver, supra*, binding and controlling. It is our contention that this case can and should be distinguished from the case at bar, as we shall hereinafter attempt to show. If, however, the case cannot be distinguished, it is our further contention, for the reason heretofore stated, that it should be reconsidered and overruled. This brings us to the discussion of the following question:

*Proposition No. II*

The decision of this Court in the case of *Childers v. Beaver*, *supra*, and the decision of the Supreme Court of the State in the case of *Childers v. Pope*, *supra*, are not applicable and controlling. If held controlling, should no longer be followed.

It is true that this Court in the case of *Childers v. Beaver*, in considering the right and power of the State of Oklahoma to assess an inheritance tax against the transfer of the estate of a full blood Quapaw Indian, held that such lands passed under a law of the United States, and not by Oklahoma's permission, and that the State was therefore without power or authority to assess an inheritance tax upon the transfer of such estate.

The Court there however, had under consideration a different statute, a statute not applicable to the Five Civilized Tribes. The Court there was considering the Act of June 25, 1910, 36 Stat. 855-856, as amended by the Act of February 14, 1913, 37 Stat. 678. This Act was passed subsequently to the enactment of Section 21 of the Enabling Act, and therefore operated to supersede that Act insofar as it pertained to the devolution of the estates of Quapaw Indians.

The right to so supersede the state law of descent and distribution, as applied to full blood restricted Indians, was reserved by Congress by Section 1, of the Enabling Act. We think Congress had the right to supersede the state law in this respect, under its general constitutional authority to legislate for and in behalf of Indians and the

Indian Tribes. Congress, however, as before stated, has never assumed to exercise such authority as pertains to estates of members of the Five Civilized Tribes. Therein lies the distinction between the case of *Childers v. Beaver*, *supra*, and the case at bar. Section 1 of that Act, there under consideration, in part provides:

"When any Indian to whom an allotment of land has been made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. \* \* \*" (U. S. C. A., Tit. 25, Sec. 372.)

Section 2, of that Act, provides:

"Any persons of the age of twenty-one years having any right, title or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior; Provided, however, that no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: *Provided, further*, that the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the In-



terior is authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located: *Provided, further*, that the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir or heirs entitled thereto, remove the restrictions, or cause patent in fee to be issued to the devisee or devisees, and pay the moneys to the legatee or legatees either in whole or in part from time to time as he may deem advisable, or use it for their benefit: *Provided, also*, that this and the preceding section shall not apply to the Five Civilized Tribes or the Osage Indians." (U. S. C. A., Tit. 25, Sec. 373.)

It will be observed that under Section 1 of the Act, *supra*, the Secretary of the Interior is given the power and authority to ascertain the legal heirs of deceased Quapaw Indians and under the provisions of Section 2, the Secretary is given the power to control the execution of wills; they can have no force and effect unless and until approved by the Secretary.

Under this Act the Courts of Oklahoma have no authority or power to determine the heirship of deceased Quapaw Indians. The law of Oklahoma has no operation or effect whatever upon the execution of the will of such Indians or the validity thereof. This being true, we think it may well be said that the devolution and transfer of the estates of deceased Quapaw Indians are controlled by

specific provisions of the Federal Law and that the law of the State, as such, has no force or effect upon the devolution of these estates.

Moreover, the Act itself specifically provides that it shall have no application to the Five Civilized Tribes or the Osage Indians.

We think the distinction here sought to be made is well illustrated by a comparison of the cases of *Blanset v. Cardin*, 256 U. S. 319, and *Blundell v. Wallace*, 267 U. S. 374.

In the *Blanset* case, there was involved the right of a full-blood Quapaw Indian to by will disinherit her husband. The Oklahoma law, Sec. 11224, Compiled Statutes 1921, then in force in the State of Oklahoma, provided among other things, as follows:

“\* \* \* No man while married shall bequeath more than two-thirds of his property away from his wife, nor shall any woman while married bequeath more than two-thirds of her property away from her husband.”

It was the contention of the husband in that case that the state statute was controlling and that he had a right therefore to inherit one-third of the estate of his wife. This Court denied that contention but in so doing, based its reasoning upon the Act of June 25, 1910. The Court held that the will was executed under and by virtue of the laws of the United States, that the above Act specifically directed the manner in which the will should be executed and that such act therefore controlled the execution of the will

rather than the state law. This same question was also before the Court in the case of *Blundell v. Wallace*, *supra*, wherein was considered the question of the right of a half-blood Choctaw woman to, by will, disinherit her husband.

The same contention was there made by the husband, as was made in the *Blanset* case, that is, that the will was void under the state law which prohibited a married woman from willing away from her husband more than two-thirds of her estate. The wife claimed the right so to do under the provision of Section 23, of the Act of April 26, 1907. This Act provides:

"Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, that no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory, or a United States Commissioner."

This Court denied such contention and held the state statute controlling, and in distinguishing the case from the *Blanset* case, *supra*, said:

"Section 23 must be read in the light of this policy; and, so reading it, we agree with the ruling of the State Supreme Court that Congress intended thereby to enable 'the Indian to dispose of his estate on the same footing as any other citizen, with the limitation contained in the proviso thereto.' The effect of Sec. 23 was to remove a restriction theretofore existing upon the testamentary power of the Indians, leaving the regulatory local law free to operate as in the case of other persons and property. There is nothing in

*Blanset v. Cardin*, 256 U. S. 319, cited to the contrary, which militates against this view. That case involved the will of a Quapaw woman devising her restricted lands away from her husband. It was held that Sec. 8341 of the Oklahoma laws did not apply because it was in conflict with an act of Congress. But the act there considered was very different from the one now under review. There the authority to dispose of restricted property by will was limited by the provisions of the Act of February 14, 1913, c. 55, 37 Stat. 678, that the will must be 'in accordance with regulations to be prescribed by the Secretary of the Interior,' and that no will 'shall be valid or have any force or effect unless and until it shall have been approved' by that officer. By this language the intent of Congress to exclude the local law and to establish the regulations of the Secretary as alone controlling was made evident; and it was so held. But here the federal statute contains no provision of like character; it is without qualification except in the single particular set forth in the proviso; and, clearly, it does not stand in the way of the operation of the local law."

We submit that the distinction made by this Court between the *Blundell* case and the *Blanset* case is applicable here; that the *Childers* case should be distinguished from this case upon the same theory, and that the Circuit Court of Appeals was in error in considering itself bound by that case.

We do not believe that this Court in that case, intended to hold that the laws of descent and distribution of the State, as applied to the devolution of estate of full-blood

Indians constitute laws of the United States, simply because Congress by the Enabling Act gave its consent to the State to control the devolution of such estates.

If however, the case can be construed as so holding, it should be reconsidered and overruled.

### ***Proposition No. III***

**The tax as herein laid does not constitute a direct burden upon a governmental instrumentality.**

The tax is not laid upon the corpus of the estate of these restricted Indians. It is not a tax assessed against their property. It is an excise tax upon the transfer of economic benefits from the dead to the living. It therefore does not constitute a direct burden upon a governmental instrumentality.

*United States v. Perkins*, 163 U. S. 625; *Plummer v. Coler*, 178 U. S. 115; *Murdock v. Ward*, 178 U. S. 139, and in the case of *United States Trust Co. of New York v. Helvering*, 307 U. S., at page 57; this Court beginning at page 60, says:

"An estate tax is not levied upon the property of which an estate is composed. It is an excise imposed upon the transfer of or shifting in relationships to property at death. The tax here is no less an estate tax because the proceeds of the policy were paid by the Government directly to the beneficiary; the taxing power was nevertheless exercised upon 'the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another.' In an analogous situation, Federal bonds exempt by statute from all taxation have been

held subject to a Federal inheritance tax. And state inheritance taxes can be measured by the value of Federal bonds exempted by statute from state taxation in any form. Similarly, the statutory immunity of War Risk Insurance from taxation does not include an immunity from excises upon the occasion of shifts of economic interests brought about by the death of an insured."

In the case of *Landman v. Commissioner*, 123 Fed. (2d) 787, the following rules are announced in paragraphs 2 and 7 of headnotes:

"Paragraph 2.

"The dominion exercised over the estate of deceased full-blood restricted Creek Indian, consisting of a restricted allotment and the proceeds of oil and gas produced therefrom by Superintendent of Five Civilized Tribes was in the nature of a guardianship for the sole benefit of the deceased and her family and for her protection, and would not vest in the Government a control exercised in furtherance of public purpose essential to exempt the estate from estate taxes under the 'government instrumentality doctrine.'

"Paragraph 7.

"The net estate of a deceased full-blood restricted Creek Indian consisting of restricted allotment and proceeds of oil and gas produced therefrom under control of Superintendent of Five Civilized Tribes, was subject to estate tax imposed upon the transfer of net estate of every decedent, since the tax falls upon the transfer or shifting of the economic benefits and not upon the property and was therefore not within constitutional immunity growing out of agreement between United States and Creek Indian granting exemption to allotted lands."



In the discussion of the case at page 789, the Court said:

"We can find nothing in the nature of the control exercised by the Superintendent as the guardian of the Indian ward which would justify the application of the instrumentality doctrine. The power and the control of the Superintendent over the estate of the Indian ward was no more than the mere exercise of a governmental function for the benefit of a private citizen. No public purpose or end is sought to be effected, except insofar as it becomes the duty of the Government to fulfill its historical obligations to a class of its citizens, recognized as a dependent people. This is especially true when the so-called instrumentality doctrine is considered in the light of the recent decisions which bear upon this question."

See also *Superintendent of Sac and Fox v. Commissioner*, 295 U. S. 481.

Measured by the rules announced in the above cases and the cases of *Helvering v. Mountain Producer's Corporation*, 303 U. S. 376; *Graves v. People of the State of New York ex rel. O'Keefe*, 306 U. S. 466, and *O'Malley v. Woodrough*, 307 U. S. 277, the tax herein assessed does not constitute a direct burden upon a governmental instrumentality.

### CONCLUSION

In conclusion, we submit there is nothing in any of the Acts of Congress pertaining to the land and the property of members of the Five Civilized Tribes which prohibits the State of Oklahoma from levying and collecting an estate tax upon the transfer of these estates; that the devolu-

tion of these estates are governed by the laws of the State of Oklahoma and not by the laws of the United States; that the case of *Childers v. Beaver*, 270 U. S. 555, is not controlling; that if such case should be construed as applying to the facts in the case at bar, then it should no longer be followed; that the tax as here laid does not constitute a direct burden upon a governmental instrumentality.

We therefore, respectfully pray that the writ be granted and that on final hearing, the judgment of the Circuit Court of Appeals be reversed and the judgment of the United States District Court for the Eastern District of Oklahoma be affirmed.

Respectfully submitted,

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December, 1942.

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**In the  
Supreme Court of the United States**

**No. 623, No. 624, No. 625 (Consolidated)**

**OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,**  
*Petitioner,*  
VERSUS  
**UNITED STATES OF AMERICA,**  
*Respondent.*

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**SUPPLEMENTAL BRIEF FOR PETITIONER,  
OKLAHOMA TAX COMMISSION**

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# **In the Supreme Court of the United States**

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**VERSUS**

**UNITED STATES OF AMERICA,  
*Respondent.***

---

**SUPPLEMENTAL BRIEF FOR PETITIONER,  
OKLAHOMA TAX COMMISSION**

---

**ARGUMENT**

**(Emphasis supplied)**

The question herein involved concerns the right and power of the State of Oklahoma to assess an inheritance tax against the transfer of the estates of full blooded restricted

deceased Indians, members of the Five Civilized Tribes. It is conceded that the estates herein involved are restricted. Act of May 27, 1908, 35 Stat. 312, as amended by Act of April 12, 1926, 44 Stat. 239; Act of Jan. 27, 1933, 47 Stat. 777. The purpose of this brief is to extend the discussion of the propositions presented in the brief supporting the application for certiorari.

The Oklahoma law of descent and distribution applies to the estates of the Five Civilized Tribes as a law of the state, and not as a law of Congress.

Basically, inheritance and estate taxes constitute excises or charges upon the devolution of an estate. This is based upon the premise that the rights to receive or transmit property are not natural rights, but are creatures of the Legislature, and are, therefore, subject to taxation by the authority which created them, or contributed to their creation and protection.

In the case of *The Estate of Helen McKennan* (S. D.), 126 N. W. 611, 33 L. R. A. (N. S.) 606, it is stated in paragraph 1 of the syllabus:

“An inheritance or succession tax is a tax upon the exercise of the right to transmit property, and is based upon the right of taxation, and not upon the right to regulate the succession of property.

“4. A succession tax of property transmitted to a widow and certain heirs, is not one on property.

"5. A succession tax, not being a tax on property, is not affected by constitutional provision that all taxes shall be uniform."

In the case of *Knowlton v. Moore*, 178 U. S. 41, it is stated in the body of the opinion:

"An inheritance tax is not one on property, but one on the succession. The right to take property by devise or consent is a creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation."

The court was here quoting from the case of *Scholey v. Rew*, 23 Wall. 331. In the opinion, the court says:

"Thus, looking over the whole field, and considering death duties in the order in which we have reviewed them, that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of her colonies where such laws have been enacted, in the legislation of the United States and the several states of the Union, the following appears: Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, or privilege taxes, nevertheless, tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the trans-

mission from the dead to the living, on which such taxes are more immediately rested.

“Having ascertained the nature of death duties, the first question which arises is this: Can the Congress of the United States levy a tax of that character? The proposition that it cannot rests upon the assumption that, since the transmission of property by death is exclusively subject to the regulating authority of the several states, therefore, the levy by Congress of a tax on inheritance or legacies, in any form, is beyond the power of Congress, and is an interference by the National Government with a matter which falls alone within the reach of state legislation. It is to be remarked that this proposition denies to Congress the right to tax a subject-matter which was conceded to be within the scope of its power very early in the history of the government \* \* \*.

“But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the state to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest, is the transmission or receipt, and not the right existing to regulate. In legal effect, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the government of the United States on the one hand, or the several states on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the states to tax objects which are confessedly within the reach of their taxing power, and also excludes the National Government from almost every subject of direct, and many acknowledged objects of indirect taxation \* \* \*.

“Can it be said that the property when imported and commingled with the goods of the state cannot be taxed,

because it had been at some prior time the subject of exclusive regulation by Congress? \* \* \* If the proposition here contended for be sound, such property or dealings in relation thereto cannot be taxed by Congress, even in the form of a stamp duty. It cannot be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the National and State governments are divested of those powers of taxation which from the foundation of the government admittedly have belonged to them. Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient, and not upon the power of the state to regulate. This distinction shows the inapplicability to the case in hand of the statement made by Mr. Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 431, 'that the power to tax involves the power to destroy.' This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists."

Expressed in terms of the text writers, Sec. 3, Part 2, Gleason and Otis, 4th Edition:

"Fundamentally, the tax rests upon the proposition that a man cannot take with him into the world beyond, the possessions he has acquired here. When he dies, the possessions become the property of the state, or to such persons as the laws of the state may direct. Descent is a creature of statute, and not a natural right."

From the foregoing, it may be deduced that inheritance, estate, transfer or succession taxes are primarily an incident of probate jurisdiction, and that such laws levying taxes of either nature are incidents of the law of descent and distribution. The heir or legatee has no vested right in the



property of the ancestor until after death. The extent of title, right or interest the heir may take in the property of the deceased, depends on the degree of grace of the State law.

The case of *U. S. v. Perkins*, 163 U. S. 625, states:

"Thus, the tax is not upon the property in the ordinary sense of the word, but upon the right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee."

The heir or legatee has no vested interest in the property of the ancestor; he enjoys only the prospect of inheritance at the death of the ancestor; therefore, a tax in the form of an excise on the devolution of the estate, could not burden the property of the heir; the excise is exacted before he receives it, and such tax is permissible. When the Congress provided that the law of descent and distribution, including the determination of heirship as applied to the Five Civilized Tribes, should be the laws of the State of Oklahoma, the Congress put into effect all of said laws of descent and distribution, together with the probate procedure which said laws included, as an essential component part thereof, the charges, excises or other contributions to the state.

This Court, in the *Perkins* case last above cited, makes it clear that the heir receives nothing until after the estate shall have completely passed through the gauntlet of state administration, subject to whatever contributions therefrom the state law demands.

The Act of May 27, 1908, 129, Sec. 9, 35 Stat. 312, recognized and treated the laws of descent and distribution of the State of Oklahoma, as applicable to land allotted to members of the Five Civilized Tribes.

We call attention in this connection to the case of *Coolidge v. Long*, 282 U. S. 582, to the effect that:

"No one has a natural right either to own property, or to transfer it at his death, but derives the power to do so solely from the state."

And in *Dunn v. Micco*, 106 Fed. (2d) 356, at page 359 of the body of the opinion:

"Furthermore, Congress, by the proviso to Section 9 of the Act of May 27, 1908, recognized and treated 'The law of descent and distribution of the State of Oklahoma' as applicable to lands allotted to members of the Five Civilized Tribes. *Jefferson v. Fink*, 247 U. S. 388."

The foregoing considerations bring us to the question of whether or not there is anything in the Enabling Act, admitting Oklahoma to statehood, or in the Oklahoma Constitution, accepting the terms of the Enabling Act, which militates against the tax sought to be assessed in this case. Section 1 of the Enabling Act (34 Stat. 267), provides:

"That nothing contained in the said constitution shall be considered to limit or impair the rights of persons or property pertaining to the Indians of said territory (so long as such rights shall remain unextinguished), or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights, by

treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed."

Section 3, sub-section 3 of the Enabling Act, reads:

"The people inhabiting said proposed state do agree and declare that they forever disclaim all right and title in or to \* \* \* all lands lying within said limits, owned or held by any Indian, tribe or nation; \* \* \*."

The Constitution of Oklahoma, Article 1, Section 3, disclaims title as to lands of the Indians, in the following language:

"The people inhabiting the state do agree and declare that they forever disclaim all right and title in or to \* \* \*; and to all lands lying within said limits, owned or held by any Indian, tribe or nation; \* \* \*."

In the section of the Oklahoma Constitution, specifying tax exemptions, being Article 10, Section 6, it is provided:

"All property \* \* \* and such property as may be exempt by reason of treaty stipulations existing between the Indians and the United States Government, or by Federal laws during the force and effect of such treaties or Federal laws, \* \* \*"

shall be exempt.

There is neither a treaty stipulation between the Indians and the National Government, nor is there any Act of Congress which forbids the tax. The sole ground on which immunity is based is the provision of the Federal Constitution giving Congress exclusive jurisdiction over Indian tribes, and such Acts as relate to the power of the Secretary of the

v

Interior to manage their affairs, including the right of Congress (which has been unexercised as to the Five Civilized Tribes) to legislate directly in casting the descent, and the distribution of Indian estates by Congress itself, or through any existing primary department of the Federal government.

The case therefore pivots on the point of whether or not the estate devolves by virtue of the National Law, or as a transfer made pursuant to the laws of the State of Oklahoma.

The Solicitor General cites four cases in support of the argument that the property is passed from the ancestor to the heir by authority of Congress, notwithstanding the adoption of the provisions of the laws of Oklahoma, for the purposes of determining heirship, and otherwise casting the inheritance.

In reading the cases cited, we fail to find any one of them supporting the Solicitor's point of view. The case of *Jackson v. Harris*, 43 Fed. (2d) 513, hereinabove referred to, negatives the position of the Solicitor in unmistakable terms, and uses the following language:

"Congress, making Oklahoma statute control the devolution of the estates of Indians in Oklahoma, did not adopt the law of Oklahoma as a Federal law, but merely provided that devolution should be in accordance with local law."

In *Jefferson v. Fink*, 247 U. S. 288, we discover nothing on the point, except the declaration of the court that:

“The laws in force in the territory of Oklahoma, so far as applicable, should extend over and apply to the state;”

citing the Oklahoma Constitution, Article 25, Section 2, making a similar provision, and held further that the Oklahoma statutes of descent supplanted the Arkansas statute, and governed the descent of Creek allotments. In the body of the opinion, on the last page thereof, it is stated:

“The state was admitted into the Union November 16, 1907, and thereupon, the laws of the territory relating to descent and distribution became the laws of the state.”

Thereafter, Congress by the Act of May 27, 1908, recognized and treated the laws of descent and distribution of the State of Oklahoma as applicable to the members of the Five Civilized Tribes.

The cases of *Parker v. Richard*, 250 U. S. 235; *In re: Jessie's Heirs*, 259 Fed. 694 (E. D. Okla.), and *In re: Fulsom's Estate*, 141 Okla. 300, are no doubt cited by counsel for respondent to support their contention that there is no material distinction between the facts set forth in the *Beaver* case, 270 U. S. 555, and the facts in the cases at bar.

These cases in effect hold that the county courts of the State of Oklahoma in determining heirship in cases of the character here involved, under authority conferred upon them

by the Act of Congress of June 14, 1918 (40 Stat. 606, 25 U. S. C. A., Sec. 375), in effect act as Federal Agencies. This Act provides:

"A determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the probate court of the State of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said state for the determination of heirship in closing up the estates of deceased persons, shall be conclusive of said question: Provided, That an appeal may be taken in the manner to the court provided by law, in cases of appeal in probate matters generally: Provided further, That where the time limited by the laws of said state for the institution of administration proceedings has elapsed without their institution, as well as in cases where there exists no lawful ground for the institution of administration proceedings in said courts, a petition may be filed therein having for its object a determination of such heirship and the case shall proceed in all respects as if administration proceedings upon other proper grounds had been regularly begun, *but this proviso shall not be construed to reopen the question of the determination of an heirship already ascertained by competent legal authority under existing laws*: Provided further, that said petition shall be verified, and in all cases arising hereunder service by publication may be had on all unknown heirs, the service to be in accordance with the method of serving nonresident defendants in civil suits in the district courts of said state; and if any person so served by publication does not appear and move to be heard within six months from the date of the final order, he shall be concluded equally with parties personally served or voluntarily appearing (June 14, 1918, c. 101, No. 1, 40 Stat. 606)."



It is the theory of the Solicitor that in this respect there is no material difference or distinction between the Federal Acts applicable to members of the Five Civilized Tribes of Indians and other tribes to which the Act of June 25, 1910, as amended by the Act of February 14, 1913, is made applicable; that as to the Five Civilized Tribes, the Act of Congress designates the county courts as a Federal Agency to determine heirship and that as to other tribes the Secretary of the Interior is designated as such agency for this purpose and that the distinction therefore sought to be made by petitioner, between the facts in the case at bar and the Beaver case, *supra*, is untenable.

There is, however, a material distinction in this respect between the Five Civilized Tribes of Indians and other tribes referred to in the Beaver case.

The courts of the State of Oklahoma ever since the admission of the State into the Union, had authority, power and jurisdiction to determine as a matter of fact, who constitute the heirs of deceased restricted Indians of the Five Civilized Tribes. This jurisdiction has at all times been and is now vested in the district courts of the State, independent of the Act of Congress of June 14, 1918, conferring such jurisdiction upon the county courts of the State. This jurisdiction has always been exercised by the district courts of the State under their equity powers to determine title to land.

This contention is supported by an opinion of the Supreme Court of the State in the case of *March v. Peter*, 179 Okla. 207, 64 Pac. (2d) 912. It is there said:

"The authority vested in the county courts of this state by the Act of Congress of June 14, 1918, 40 St. at L. 606, to make a conclusive determination of who are the heirs of a deceased citizen allottee of one of the Five Civilized Tribes of Indians having restricted heirs, is not exclusive. It does not deprive the district courts of the state of jurisdiction or authority to determine the same question in suits involving the allotted lands of such a deceased allottee. In such action, if there has been a previous valid determination of heirship by the probate court which has not been disturbed on appeal, it is conclusive on the question. Otherwise the district court may investigate the question and exercise its own independent judgment based upon the evidence produced."

In the case of *Homer v. Lester*, 95 Okla. 284, 219 Pac. 392 (Certiorari denied, 264 U. S. 508), the Supreme Court of the State, beginning at page 291, said:

"We have no disposition to modify the holding in *State ex rel. Miller v. Huser*, *supra*, that 'Congress had authority to make the county officers federal agencies and administrative, as distinguished from courts exercising strictly judicial powers,' to determine conclusively heirship to restricted lands; that is, determine who are the restricted heirs of deceased allottee. Congress not only has the power to constitute the county courts its agents to determine heirship to restricted lands, but may, in its discretion, take away that authority from county courts and confer it upon the Secretary of the Interior, or the Superintendent of Indian Affairs, or any other officer of the United States. But, as held by the United States Circuit Court of Appeals for the Eighth Circuit in *Mc-*

*Dougal v. Black Panther Oil & Gas Co.*, 273 Fed. 113, the jurisdiction of the probate courts under the Act of Congress of June 14, 1918, is 'Concurrent with the Federal and State district courts of the question who were the restricted heirs of the respective deceased allottees described in the Act.' In other words, the Federal district court in a proper case has authority to determine the heirs, and likewise the state district court in proper cases has jurisdiction to determine the heirs, and the Act of Congress expressly recognizes that the state and federal district courts have at all times possessed that jurisdiction, because the act says: 'But this proviso shall not be construed to reopen the question of the determination of an heirship already ascertained by competent legal authority under existing laws.' "

In the case of *Roberts v. Anderson*, 66 Fed. (2d) 874, the Circuit Court of Appeals of the Tenth Circuit, speaking on this same question, said:

"It is now entirely settled that the act empowering the county courts of Oklahoma to determine heirship does not prohibit other courts from ascertaining and deciding the facts as to heirship whenever necessary in litigation in such other courts. Judge Sanborn, speaking for the Eighth Circuit Court of Appeals in *McDougal v. Black Panther Oil & Gas Co.*, 273 Fed. 113, 118, examined the question from the standpoint of the statutes, the decisions, and public policy, and so determined; that decision has been followed in a great mass of litigation over Indian titles.

"Judge Rainey, speaking for the Supreme Court of Oklahoma, in an opinion characterized by Judge Sanborn as 'exhaustive, instructive and convincing,' came to the same conclusion in *State v. Huser*, 76 Okla. 130, 184 Pac. 113, 122, and *State v. Wilcox*, 75 Okla. 158, 182 Pac. 673, where a writ of prohibition directed to the judge of a superior court who was about to determine

heirship as an incident to a suit to quiet title, was denied. See, also, *Homer v. Lester*, 95 Okla. 284, 219 Pac. 392.

"From these authorities it is clear that while the county court has jurisdiction to determine the fact of heirship of deceased citizen allottees of the Five Civilized Tribes, such jurisdiction is *not exclusive but concurrent*; and that where such fact of heirship is necessary for the determination of actions pending in another court, such court may determine such fact, and need not stay its hand until the county court has acted. The first valid adjudication of the fact by either court is conclusive upon the other within the principles of estoppel by judgment."

This rule does not prevail as to the Quapaw Tribe of Indians and other tribes governed by the Act of Congress of June 25, 1910, as amended by the Act of February 14, 1913, as to such tribe of Indians, no court in the State of Oklahoma has authority or power to determine heirship in advance of such determination by the Secretary of Interior. This position is sustained by this Court in the case of *Hallowell v. Commons*, 239 U. S. 506. This case holds that the Act of June 25, 1910, vesting in the Secretary of Interior the power and authority to determine heirship as to Indians controlled by that Act, operates to divest the Federal courts of all equitable jurisdiction to determine title to land on application of the alleged heirs of such deceased Indians.

It will thus be seen from the above authorities that restricted heirs of deceased members of the Five Civilized Tribes independent of the Act of Congress conferring jurisdiction upon the county courts to determine heirship, may

in a proper case, apply to the district court of the State in order to have such heirship determined; that they may utilize such courts to determine their rights as heirs of their deceased ancestors.

The courts of the State are not open to the heirs of deceased Quapaw Indians to determine such rights, as, to them, such rights are determined by the Secretary of the Interior, and by him alone.

Therein as stated in our Brief in Support of Petition for Certiorari, lies the distinction between the Beaver case and the case at bar.

Assuming, however, that the situation between these tribes of Indians is somewhat analogous, it might not be amiss or incorrect to state that when the Enabling Act provided that the laws of Oklahoma Territory should be the laws of the State, and the Congress provided that the descent and distribution of the land of deceased members of the Five Civilized Tribes should devolve or be transmitted according to the laws of the State of Oklahoma, such laws remained the laws of the State of Oklahoma, as distinguished from the laws of Congress; OTHERWISE, SUCH ATTEMPT WOULD NOT BE IN HARMONY WITH THE CONSTITUTION OF THE STATE OF OKLAHOMA, NOR ARTICLE 3 OF THE CONSTITUTION OF THE UNITED STATES, WHEREIN THE JUDICIAL POWER OF THE UNITED STATES IS DEFINED AND LIMITED TO THE

COURTS THEREIN SPECIFIED, OR TO OTHER FEDERAL COURTS, ORDAINED AND ESTABLISHED BY THE CONGRESS.

The county court of Oklahoma is a judicial court; and administration of an estate in the exercise of probate jurisdiction, is a judicial proceeding; appeal lies to the district court, which is the judicial court of general jurisdiction of the State of Oklahoma; from that court an appeal lies to the Supreme Court of the State of Oklahoma, in probate matters. Is it to be understood that each of these tribunals in turn, constitutes an instrument of the Federal Government, administering a Federal law? If so, what would mark the limitation on the power of the Federal Government to establish judicial power as defined in Section 3 of the Federal Constitution, by creating judicial instrumentalities of the state courts, and what of the Oklahoma Constitution, which defines and limits the judicial power of its own court?

In presenting the above, we are mindful of *Minn. & St. L. Ry. Co. v. Bombalis*, 241 U. S. 211, but do not believe the doctrine therein announced permits the complete adoption of a system of state law as a Federal law, to be administered by a state court as an exclusively Federal instrument, but it is an example of the co-operative or joint action inherent in the principle of our dual Federal and State system.

It may not be amiss to observe that at the time of the enactment of the Acts of Congress, conferring the laws of the



State of Oklahoma and the jurisdiction of the Oklahoma County Court to cover the administration of Indian estates, that it was looking forward to the early closing up of Indian supervision, and that as the restrictions were removed by death, the lands descending to the heirs became free, and therefore subject to the jurisdiction of the court having settlement of the estate, under the laws of the state; and to avoid a divided jurisdiction as to restricted and non-restricted Indian estates, the laws of the state were adopted.

#### **BOTH SOVEREIGNTIES MAY ACT JOINTLY**

May not the transmission of the estates of deceased members of the Five Civilized Tribes be brought about by the laws of both the Federal and State governments, operating in conjunction, and both together, effecting the transmission of title from the ancestor to the heir? It is not a question of degrees of contribution of the respective governments, but each, contributing in co-ordination, satisfies the element precedent to authority to lay the tax.

A case in point is that of *State Tax Commission of Utah v. Aldridge*, 116 Pac. (2d) 923, 316 U. S. 174. There the Supreme Court of the state disallowed the tax on the strength of the opinion of this Court in *First Nat'l Bank v. Maine*, 284 U. S. 312, at the same time stating that but for that case the tax would be sustained, but the state court felt constrained to follow this Court's opinion, as long as same was not overruled; indicating that were the matter an original proposi-

tion, the decision would have been otherwise. In the instant case, the Circuit Court made practically the same announcement, to the effect that while it thought the tax was within the scope of the state's jurisdiction, so long as the case of *Childers v. Beavers*, 270 U. S. 555, remained intact, the Circuit Court was bound to follow it, and that this Court was the only court which could terminate the rule announced in the *Beavers* case.

In *State Tax Commission of Utah v. Aldrich*, *supra*, the rule stated by Mr. Justice Frankfurter, should rule this case. It is there held:

"Modern enterprise often brings different parts of an organic commercial transaction within the taxing power of more than one state, as well as of the Nation. It does so because the transaction in its entirety may receive the benefits of more than one government, and the exercise by the states of their constitutional power to tax may undoubtedly produce difficult practical and fiscal problems, but they are inherent in the nature of our federalism, and are part of its price."

In the instant case, we know of no reason why the functioning of the state courts in administering the estate of the Indian under the state laws and procedure, authorized by the Congress, does not make the state laws and state instrumentalities at least substantially contributing factors in the transmission of the estate from the ancestor to the heir; and it would appear that such contribution was, within itself, enough on which to lay the taxing power. If the proposition should be reduced to a matter of degrees, then it would ap-

pear that in the actual transmission of the estate, there is a greater degree of exercise and activity on the part of the state laws and machinery, than there is in the mere permissive granting of authority by the Congress. This is given emphasis, when we realize that it is within the power of Congress to reassert full dominion over the subject-matter. When it has not done so, and permits the state to use its laws, courts and officers in the performance of the transmission of the estate, the consent of Congress for the state to compensate itself through reasonable taxation, may well be presumed. Furthermore, it is within the power of Congress to deny the right of taxation by direct and positive enactment, and if it intended to withhold the power of taxation from the state, it should have done so.

An example of the principle of co-operative exercise of jurisdiction is found in *In re. Jessie's Heirs*, *supra*, wherein it is stated in that case, that in order to permit the exercise of jurisdiction by the county court of Oklahoma conferred under the Act of Congress of June 14, 1918, to determine the heirs of full-blood Creek Indians, and to prevent conflict with the Oklahoma Constitution, Article 7, Section 12, the 1919 Oklahoma Act was supplemented by a proviso to give concurrence to said procedure, the Act of Congress of June 14, 1918, providing for the determination of heirs of any deceased allottee of the Five Civilized Tribes.

In the case of *Mudd v. Perry*, 25 Fed. (2d) 85, having under consideration "The Act of Congress of April 18,

1912," 37 Stat. 86, with reference to an Osage estate, it was held:

"This was a devolution by Congress of judicial authority upon the county courts of Oklahoma, to determine judicially, among other things, who were rightful claimants to the estate of deceased allottees of the Osage Indian Tribe. It was more than a mere selection of the county court for the performance of a ministerial or executive duty. It involved, as Congress must have intended, a judicial inquiry. The county courts of Oklahoma were not designated as agents or final arbiters in such matters, but it was provided that such estates 'shall, in probate matters, be subject to the jurisdiction of the county courts.' "

The above was quoted with approval in the case of *Thompson's Estate*, 179 Okla. 240, 65 Pac. 442. In that case, it is said at page 241:

"In view of the foregoing decisions, the county courts, under the Act of 1912, are left free to exercise the same jurisdiction and powers over the estates of deceased Osages as it may in the administration of the ordinary citizens, under the Constitution and laws of this state."

And at page 242 (Okla. Rep.):

"Under the Act of 1912, the county court, in the estates of deceased Osages, acts judicially as a court of probate, and not as a Federal administrative agency."

The case of *Childers v. Beavers*, 270 U. S. 555, should not be followed in this instance, and if not distinguishable, should be overruled. The Circuit Court in its opinion in this case, page 338, 131 Fed. Sess., states:

"It is true that the instrumental doctrine as applied to restriction on lands of Indians, has been limited by

the decision of the Supreme Court in *Helvering v. Mountain Producers Corporation*, 303 U. S. 375, which expressly overruled the *Coronado* and *Gillespie* cases; but *Childers v. Beavers*, *supra*, has not been overruled, and this court is still bound by that decision.

"Restricted Indians in Oklahoma enjoy the privileges and protection of local laws. The local courts are open to them for the redress of grievances. The estates of deceased members of the Five Civilized Tribes are administered in the county courts of Oklahoma. Their wills are probated, and their heirs determined in such courts. Members of the Five Civilized Tribes are citizens of Oklahoma, and enjoy the privileges and benefits of that citizenship. It would seem to the reader of this opinion that the Enabling Act should be considered as consenting to the application of the local law of Oklahoma, with respect to the devolution of property of Indians who are administered in and residents of that state, and that such property should be regarded as passing under the laws of Oklahoma, and subject to inheritance tax by Oklahoma. *But that, however, could only prevail if Childers v. Beavers, supra, were overruled. Whether it shall stand or be overruled, only the Supreme Court of the United States may decide.*"

The distinction between the circumstances of the *Beavers* case and that of the instant case may be found in the fact that under the express provisions of the Act of Congress governing the Quapaw Indians, the Secretary of the Interior was clothed with power to determine the heirs according to the State law of descent, and Congress directed the devolution of lands in case of death of the restricted owner. The action of the Secretary of the Interior was, of course, ministerial. In the Quapaw situation, the Secretary of the Interior also

had the power to supervise the execution of wills, and disapprove same, without regard to the Oklahoma law.

This distinction and other grounds for differentiating the facts, are clearly set out by Judge Murrah in the dissenting opinion, and offer a correct solution of the case, unless the Beavers case is to be overruled in its entirety, which, in our opinion, should be done.

In the Murrah opinion, at page 639, is to be found the following:

"Under the express provisions of this Act, *supra*, 'it was the duty of the Secretary of the Interior to determine the heirs according to the state law of descent,' but Congress provided how the lands should descend and directed how the heirs should be ascertained. The law of descent in Oklahoma is applicable only insofar as it is made a criterion for the guidance of the Secretary of the Interior, whose administrative duty it is to approve the execution of a will by an Indian ward, or to disapprove the same without regard to the law of Oklahoma. It is only after the disapproval of the will that the Secretary of the Interior is directed to determine heirship in accordance with the laws of Oklahoma. In no event does the law of Oklahoma have any operation or effect upon the execution of the will or the validity thereof. Neither are the courts of Oklahoma utilized to determine heirship in the event its laws become relevant. But the determination of heirship is an administrative function entrusted to the Secretary of the Interior, guided by local law. The probate courts of Oklahoma have no jurisdiction over the will or the determination of the heirship. *Blanset v. Cardin*, 256 U. S. 319, 41 S. Ct. 519, 65 L. ed. 950; *Hanson v. Hoffman* (10 Cir.), 113 Fed. (2d) 780.



"But with respect to members of the Five Civilized Tribes, the Congressional policy as expressed by numerous statutes is entirely different. The history relating to the application of the laws of Oklahoma to the Five Civilized Tribes, including the law of descent, is well stated by the majority and need not be repeated here. It is sufficient to say that long prior to statehood, the prevailing law in the Indian Territory was applicable uniformly to the Indian as well as the white man. The Indian citizen was equally entitled to its protection and equally amenable to its processes.

"With exceptions not material here, a member of the Five Civilized Tribes is authorized to dispose of his or her estate on the same footing as any other citizen. They are authorized to dispose of their estates by will in accordance with the laws of Oklahoma and not in derogation thereof. The law of Oklahoma is not merely a guide or criterion, but it creates the right and provides the means and manner of disposition. *Jefferson v. Fink*, 247 U. S. 288, 38 S. Ct. 516, 62 L. ed. 1117; *Blundell v. Wallace*, 267 U. S. 373, 45 S. Ct. 247, 69 L. ed. 664; see also *Caesar v. Burgess* (10th Cir.), 103 Fed. (2d) 503.

"In my judgment, the valid distinction made clear by a comparison of *Blanset v. Cardin*, *supra*, and *Blundell v. Wallace*, *supra*, furnished the basis for the denial of the taxing power of the state in *Childers v. Beaver*, *supra*, and the sanction of that power under the attendant circumstances. In *Blanset v. Cardin*, *supra*, the property was transmitted under and by virtue of an Act of Congress which provided the means and manner by which the property would pass, and its passing depended upon the administrative determination of the Secretary of the Interior, and not the courts of Oklahoma. The law of Oklahoma had relevancy only as a guiding principle which acted only by force of the administrative agency empowered to administer it. While in *Blundell v. Wallace*, *supra*, the laws of Oklahoma and the courts which interpreted them were made the arbiters of the

right to direct the testamentary disposition, and the law of descent determined its disposition. As respects members of the Five Civilized Tribes, the right to dispose of their property by will is created by the law of Oklahoma. The executed will is valid according to Oklahoma law and it is enforceable only in the courts of that state. In the absence of a will, the right to inherit is created by Oklahoma law and is enforceable in its courts and not elsewhere or otherwise. Therein lies the incidence of the tax and the power to enforce it.

“ \* \* \* Neither has the Federal government expressly or inferentially exercised its indubitable power to exempt the transmission of the estates from the scope of the state taxing act. Nothing stands in the way of the exaction of the tax except the question of whether the property passes under the laws of the state. In my judgment, it does and the tax should be sustained.”

A further distinction may be made between the Beavers case and the case at bar. This Court in that case, as before stated, was construing the Act of June 25, 1910, as amended. This Act specifically provides that upon disapproval of the will of an Indian controlled by that Act, his property should descend or be distributed in accordance with the laws of the State wherein the property is located. Congress has enacted no similar law concerning the descent or distribution of the property of members of the Five Civilized Tribes of Indians in Oklahoma. There is no specific Act of Congress directing the manner in which the property of such Indians should descend or be distributed, except the Act of May 27, 1908, Sec. 9, 35 Stat. 312, which provides that where there is issue born since March 4, 1906, the homestead shall remain

restricted and be inalienable during the life of such issue; but if there be no issue born subsequent to that date, then the homestead shall descend, free from all restrictions, in accordance with the laws of the State of Oklahoma. The only other Act of Congress touching on this subject concerning the Five Civilized Tribes appears in the Enabling Act, which provides that upon the admission of the State into the Union:

“All laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said State except as modified or changed by this Act or by the Constitution of the State  
• • • • •”

This being true, it is our contention that upon the acceptance of this Act by the Constitutional Convention and the adoption of the Constitution of the State, by the people, the law of descent and distribution then in force in the Territory of Oklahoma, including that of descent and distribution of Indian lands, became a law of the State of Oklahoma and remained a law of the State as applicable to Indian estates, except as thereafter changed by specific Act of Congress; and since Congress has at no time seen fit to exercise its right to specifically direct the manner in which the property or estates of deceased members of the Five Civilized Tribes should descend or be distributed, the law of the State of Oklahoma in this respect controls not as a Federal law, but as a law of the State.

We, therefore, submit that the language used by this Court in the Beavers case, that the land there involved “pass-

ed under a law of the United States, and not by Oklahoma's permission" is not at all applicable to the case at bar.

The Court in the above case did not hold, and we submit that it did not intend to hold, that simply because Congress through the Enabling Act gave its consent to the State to put in force relative to these Indian estates the laws of descent and distribution of the State, that such law after having been put in force by the State should constitute and forever thereafter remain a Federal law.

We, therefore, respectfully submit that for the reasons stated in the original brief and herein, the judgment of the Circuit Court be reversed and the tax be sustained.

Respectfully submitted,

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March, 1943.

## APPENDIX TO BRIEF

(Acts of Congress)

Act of May 27, 1908, 35 Stat. 312, Section 9, provides:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in Section 1 hereof, for the use and support of such issue, during their life or lives, until April 26, 1931; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; but if this be not done, or in the event the issue hereinbefore provided for die before April 26, 1931, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further*, That the provisions of Section 23 of the Act of April 26, 1906, as amended by this Act, are hereby made applicable to all wills executed under this section."

Section 1 of the Act of April 18, 1926, 44 Stat. 239, provides:

"The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the aliena-

tion of said allottee's land: Provided, that hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by Section 1 of this Act acquired by inheritance or devise from an allottee of such lands shall be valid unless approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee or testator: Provided further, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior for the use and support of such issue, during their life or lives, until April 26, 1931; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from restrictions; if this be not done, or in the event the issue hereinabove provided for die before April 26, 1931, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: Provided, That the word 'issue,' as used in this section, shall be construed to mean child or children: Provided further, That the provisions of Section 23 of the Act of April 26, 1906, as amended by this Act, are hereby made applicable to all wills executed under this section: And provided further, That all orders of the county court approving such conveyances of such land shall be in open court and shall be conclusive as to the jurisdiction of such court to approve such deed. Provided, That all conveyance by full-blood Indian heirs, heretofore approved by the county courts, shall be deemed and held to conclusively establish the jurisdiction of such courts to approve the same interest in the same land has been made by the same Indian to different grantees and approved by county courts of different counties prior to the passage of this Act, and except that this proviso shall not affect and may not be pleaded in any suit brought before the approval of this Act."



Section 1 of the Act of May 10, 1928, 45 Stat. 495, provides:

“That the provisions of Section 9 of the Act of May 27, 1908 (35 Stat. L. 312), entitled ‘An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes,’ as amended by Section 1 of the Act of April 12, 1926 (44 Stat. L. 239), entitled ‘An Act to amend Section 9 of the Act of May 27, 1908 (35 Stat. L. 312), and for putting in force, in reference to suits involving Indian titles, the statutes of limitations of the State of Oklahoma, and providing for the United States to join in certain actions, and for making judgments binding on all parties, and for other purposes,’ be, and are hereby, extended and continued in force for a period of 25 years from and including April 26, 1931, except, however, the provisions thereof which read as follows:

“Sec. 2.

“ ‘Provided further, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior for the use and support of such issue, during their life or lives, until April 26, 1931; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from restrictions; if this be not done, or in the event the issue hereinabove provided for die before April 26, 1931, the lands shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: Provided, That the word “issue,” as used in this section, shall be construed to mean child or children: Provided further, That the provisions of Section 23 of the Act of April 26, 1906, as amended by this Act, are hereby made applicable to all wills executed under this section:’ which

quoted provisions be, and the same are, repealed, effective April 26, 1931: Provided further, That the provisions of Section 23 of the Act of Congress approved April 26, 1906 (34 Stat. L. 137), as amended by the provisions of Section 8 of the Act of Congress approved May 27, 1908 (35 Stat. L. 312), be, and the same are, hereby continued in force and effect until April 26, 1956.

"Sec. 3. That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, shall be subject to all State and Federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from the individual Indian funds held under his supervision and control and belonging to the Indian owners of the lands, the tax or taxes so assessed against the royalty interest of the respective Indian owners in such oil, gas and other mineral production.

"Sec. 4. That on and after April 26, 1931, the allotted, inherited and devised restricted lands of each Indian of the Five Civilized Tribes in excess of 160 acres shall be subject to taxation by the State of Oklahoma under and in accordance with the laws of that State, and in all respects as unrestricted and other lands: Provided, That the Indian owner of restricted land, if an adult and not legally incompetent, shall select from his restricted land a tract or tracts, not exceeding in the aggregate 160 acres, to remain exempt from taxation, and shall file with the Superintendent for the Five Civilized Tribes a certificate designating and describing the tract or tracts so selected: And provided further, That in cases where such Indian fails, within 2 years from date hereof, to file such certificate, and in cases where the Indian owner is a minor or otherwise legally incompetent,

the selection shall be made and certificate prepared by the Superintendent for the Five Civilized Tribes; and such certificate, whether by the Indian or by the Superintendent for the Five Civilized Tribes, shall be subject to approval by the Secretary of the Interior and, when approved by the Secretary of the Interior, shall be recorded in the office of the Superintendent for the Five Civilized Tribes and in the county records of the county in which the land is situated; and said lands, designated and described in the approved certificates so recorded, shall remain exempt from taxation while the title remains in the Indian designated in such approved and recorded certificate, or in any full-blood Indian heir or devisee of the land: Provided, That the tax exemption shall not extend beyond the period of restrictions provided for in this Act: And provided further, That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres."

The Act of January 27, 1933, 47 Stat. 777, provides:

"That all funds and other securities now held by or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled, are hereby declared to be restricted and shall remain subject to the jurisdiction of said Secretary until April 26, 1956, subject to expenditure in the meantime for the use and benefit of the individual Indians to whom such funds and securities belong, under such rules and regulations as said Secretary may prescribe: Provided, That where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for restricted Indians, such lands shall remain restricted and tax-exempt during the life of and as long

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as held by such restricted Indians, but not longer than April 26, 1956, unless the restrictions are removed in the meantime in the manner provided by law: Provided further, That such restricted and tax-exempt land held by anyone, acquired as herein provided, shall not exceed 160 acres: And provided further, That all minerals including oil and gas, produced from said land so acquired shall be subject to all State and Federal taxes as provided in Section 3 of the Act approved May 10, 1928 (45 Stat. L. 495)."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

**Nos. 623-624-625**

OKLAHOMA TAX COMMISSION,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE TENTH CIRCUIT.

**BRIEF OF OKLAHOMA TAX COMMISSION IN RE-  
SPONSE TO GOVERNMENT'S BRIEF FILED APRIL  
6, 1943.**

E. L. MITCHELL,

A. L. HERR,

C. W. KING,

*Counsel for Petitioner.*

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The petitioner has been served with a 115 page brief prepared by the Department of the Interior, to which is appended the following note from the Solicitor General:

“The Solicitor General authorizes the filing of this brief. The preparation of the brief was assigned to the Department of the Interior. The Solicitor General takes no exception to the position taken.

CHARLES FAHY,  
*Solicitor General.*”

It is, of course, obviously physically impossible to file and exhaustive and responsive answer to this brief before the argument tomorrow, but wish to obtain permission of the court to file the same after the argument, within the time which may be allowed by the court. We are endeavoring to prepare as much of the manuscript as possible before the argument of the case. A glance at the Index of the brief, consisting of eight closely typed pages, will show the court that the above request is modestly appropriate.

The brief opens with the recitation of the fact that the trial court wrote no opinion but made findings of fact and conclusions at law, which as to each of the three cases are substantially the same and to the following specific effect:

#### IV

"An inheritance tax or transfer tax such as is provided by the Oklahoma law is not levied on the property of which the estate is composed. It is an excise tax upon the shifting of economic benefits, on the privilege of transferring property at death, on the transitus of the property from the dead to the living, *United States Trust Co. v. Helvering*, 307 U. S. 57; *United States v. Perkins*, 163 U. S. 625, *McGannon v. States*, 33 Okl. 145, 124 P. 1063, *Knowlton v. Moore*, 178 U. S. 41; *Landman v. Commissioner of Internal Revenue* (C. C. A. 10th), 123 F. (2d) —, decided November 11, 1941, and cases cited therein.

#### V.

"This case is primarily concerned with the question of whether or not a transfer or inheritance tax may be levied by the State of Oklahoma upon the transfer of the estate of a full-blood Indian which estate consisted principally of restricted property, restricted in the hands of the decedent and both restricted and unrestricted in the hands of the heirs. A tax upon the transfer of property is valid even though the property is restricted and tax-exempt. *Plummer v. Cole*.

178 U. S. 116; *Orr v. Gilman*, 183 U. S. 278; *United States Trust Co. v. Helvering*, *supra*. The transfer of the restricted estate of a full-blood restricted member of one (fol. 40) of the five Civilized Tribes is subject to the Federal Estate Tax. Such an estate is not deemed exempt from a transfer tax on the ground that it is a Federal instrumentality. It is not deemed a Federal instrumentality. *Landman v. Commissioner of Internal Revenue*, *supra*, and cases cited therein.

## VI

"The estate herein passed under the intestate law of the State of Oklahoma. Members of the Five Civilized Tribes are citizens of the State of Oklahoma, *Bolen v. Nebraska*, 176 U. S. 831, *Hickman v. United States*, 224 U. S. 413. As to the members of the Five Civilized Tribes it has been the policy of Congress to subject the estates of members of said tribes to the control of the local laws of succession. Sec. 23 of the Act of April 26, 1906 (34 Stat. 137), as amended; Sec. 9 of the Act of May 27, 1908 (35 Stat. 137), as amended; *Blundell v. Wallace*, 267 U. S. 373, *Jackson v. Harris* (C. C. A. 10th), 43 F. (2d) 513; *Jefferson v. Fink*, 247 U. S. 288; *Dunn v. Micco* (C. C. A. 10th), 106 F. (2d) 356.

## VII.

"Congress has the power to control the devolution of the estates of members of the Five Civilized Tribes. The State of Oklahoma concedes that Congress has this power, but contends that Congress has seen fit, by its various acts, to make applicable the laws of the State of Oklahoma to the devolution of the estates of the members of the Five Civilized Tribes. The construction of these acts of Congress and a consideration of whether or not the laws of Congress or the laws of the State of Oklahoma control the devolution of the estates of members of the Five Civilized Tribes is a Federal question and the decisions of the Federal courts are controlling. The Federal decisions, both of the Circuit Court, and

the Supreme Court in *Blundell v. Wallace*, *supra*, seem to settle this question in favor of defendant's contention. *Childers v. Beaver*, 270 U. S. 555, and *Blanset v. Cardin*, 256 U. S. 319, relied upon by the Government involved the estate of a Quapaw Indian and a construction of the Act of June 25, 1910 (36 Stat. 855) applicable to the Quapaw Indians. This act of Congress, Sec. 33 provides: 'That the provisions of this Act shall not apply to the (fol. 41) Osage Indians, nor to the Five Civilized Tribes, in Oklahoma, \* \* \*.'

### VIII.

"The estate in question passed under the intestate laws of the State of Oklahoma and the transfer of said estate is subject to the tax provided in Article 5, Chap. 66, S. L. of Oklahoma, 1935. The Government can not recover the tax that has been paid to the State of Oklahoma. Judgment is for the defendant."

The only distinguishing feature as to the conclusions in the other cases involves the 1915 Oklahoma Inheritance Tax Law, as amended, with no difference as to the applicability of the tax involved.

In the statement of the case before the court by the Solicitor General and the Attorney General briefed in opposition to the writ is the following:

#### **Question Presented.**

"Whether restricted property of deceased allottees of Five Civilized Tribes is subject to Oklahoma inheritance taxes" (page 2 original Government brief).

The case is stated by the author of the brief filed by the Department of the Interior yesterday as follows:

#### **Question Presented.**

"Whether the various sorts of restricted property of deceased allottees of the Five Civilized Tribes are subjected to Oklahoma State inheritance taxes."

The estates are treated as one entity in the original brief, whereas the brief we will designate as the Department of the Interior brief attempts to break down the specific elements of property and discusses applicability of tax to each. The estates of the three deceased members of the Five Civilized Tribes were administered and probated in the county courts of the three separate counties of their respective residence.

The brief further presents as an Appendix, excerpts of the Acts of Congress in chronological order from September 18, 1923 to Act of January 27, 1933, inclusive, followed by the Oklahoma Statutes of 1915 as amended, being the State Inheritance Tax, and those of 1935, being entitled "Inheritance and Transfer Tax," which latter act applies to the net estate and may be regarded as having aspects of an estates tax.

The Department brief is an over-all historical review of the dealings by Congress with the Indians, through which is sought to be threaded the unbroken line of tax exemption as a policy of the Government in dealing with the Indians, with the exception stated beginning at page 42, first grammatical paragraph, wherein it was sought to show that the policy of relaxation was a failure and had been repudiated by reassertion or reimposition of the policy of more stringent restrictions, all of which generalizations are foreign to the issues of the case and have no bearing upon the power of the State in the exercise of its sovereign integrity in view of its contribution and facilitation of the transmission or devolution of the estates in question from the ancestor to heir to impose a reasonable exaction in the form of an inheritance or estates tax, as shown in our original and supplemental briefs and as enunciated by this court, to the effect that the power to levy the tax is not based solely upon the exclusive function of the State

or Federal Government in bringing about the transmission of the estate as a condition precedent to the tax.

It is stated in the case of *Minnesota & St. Louis R. R. Co. v. Bombolis*, 241 U. S. 211, at page 222, in speaking of the enforcement of Federal laws through State courts as follows:

"It is true in the Mondou case it was held that where the general jurisdiction conferred by the state law upon a state court embraced other causes of action created by an act of Congress, it would be a violation of duty under the Constitution for the court to refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers. *But that ruling in no sense implied that the duty which was declared to exist on the part of the state court depended upon the conception that for the purpose of enforcing the right the state court was to be treated as a Federal court deriving its authority not from the State creating it, but from the United States. On the contrary the principle upon which the Mondou Case rested, while not questioning the diverse governmental sources from which state and national courts drew their authority, recognized the unity of the governments, national and state, and the common fealty of all courts, both state and national, to both state and national institutions, and the duty resting upon them, when it was within the scope of their authority, to protect and enforce rights lawfully created, without reference to the particular government from whose exercise of lawful power the right arise.*"

It is unfortunate that the record in this case made in the Trial Court and for review in the Circuit Court omits several facts which might be of interest to the Court; for instance, a breakdown of the sources of the trust funds with reference to the amount thereof derived from each of the



oil producing properties of the Indians, whether from homestead surplus or purchased land, also the method in which such trust funds have themselves been invested and in what amounts. But the present counsel came into the case after the Circuit Court of Appeals had written its opinion and we are helpless to present to the Court a more perfect record than that disclosed by the printed transcript.

On careful reading of the Department's brief (without a minute examination of the more than one hundred cases cited) we are unable to note any specific quotation of an authoritative character which expressly says or implicitly indicates any consideration on the part of Congress of a tax exemption such as is sought to be imposed in the present proceedings. One point pressed with considerable vigor on the part of the Department is that the space of time presented a devious case and cites cases, including *Childers v. Beavers* by this Court and *Childers v. Pope* by the Supreme Court of Oklahoma and other cases in which the State has made no effort to collect an inheritance tax and also cites for consideration a more or less argumentative statement made by counsel representing the State of Oklahoma in a hearing before the Committee on Indian Affairs in re Senate Resolution 168 of the 75th Congress pertaining to an investigation of alleged loss of State revenues because of Indian tax exemptions, in which the counsel stated:

"Incidentally, I wish to call your attention to the fact that inheritances of restricted Indian estates are likewise exempt from the State inheritance or estates tax."

The above was purely a statement of fact justified by the record in cases theretofore presented to the courts and decided on the strength of the compulsion of *Childers v. Beaver*, 270 U. S. 555, and in which estate cases, particularly that of *Childers v. Pope*, 119 Okla. 300, the Supreme

Court of Oklahoma stated that in the opinion of the court the estate (which was an Osage estate) was subject to the tax, but that the State court was bound by the holding in *Childers v. Beaver*. So that in view of a long line of Federal cases preceding any State cases holding under the Federal instrumentality theory that the State was without power to levy the admitted tax on Indian properties, it is no wonder there was some hesitancy on the part of the State to make futile expenditures of energy and wealth to sustain the taxes. Such lapse, however, does not constitute any State, Departmental or contemporaneous construction of the laws in favor of the tax exemptions, because not only in the State case, but in the Federal cases the expression of dissent with the conclusion reached by this Court in the *Beaver* case was so pronounced as to show nothing short of a feeling of compulsion to follow the mandates of this Court as the last expression on the subject, commanding obedience.

In order to answer effectively, however, the statement of the Government in the last brief filed, and particularly with reference to the position taken by the State representatives before the Senate committees, we call attention to page 11 of Senate committee report on S. Res. No. 168 wherein the same authority quoted by counsel stated:

"The State supreme court, on which sat present Circuit Judge R. L. Williams, as chief justice, later Governor of the State, who was a member of the constitutional convention; Samuel W. Hayes, a member of the constitutional convention; and Matthew J. Kane, likewise a member, held the lands and the oil and gas taxable. That case was reversed by the Supreme Court of the United States, and all efforts to enforce legislation by the State to tax either the Indian lands, the Indians' oil and gas from Indian lands—that is, his royalty of one-eighth—or the seven-eighths working interest belonging to the oil operators were denied by the Federal Government as being in violation of allotment statutes of the United States and on the further general ground

that they inherently impinged the agencies or instrumentalities of the Federal Government in that the Federal Government could not successfully administer the fortunes of the Indian if he was to be subjected to State taxation."

Furthermore, at page 12 of the same document is found the following in response to a question from one of the Senators:

"Immediately after statehood (November 16, 1907) the legislature was convened and enacted a number of revenue measures among which were the following:

. . . . .

(Here follows a list of many revenue measures enacted by the first State Legislature.)

The report continues:

"Efforts were made by the taxing authorities of the State to apply each and every one of the foregoing tax measures, except the graduated land tax, to oil and gas and other minerals produced from Indian land, and to collect the general ad valorem tax from restricted Indian lands and the State authorities were in each instance denied the right to collect such taxes as shown by a long line of State and Federal court decisions, a brief resume of which is as follows:

"*Choctaw & Gulf R. R. v. Harrison* (1914) (235 U. S. 292), held that, where by agreement with an Indian tribe the United States assumed a duty in regard to operation of coal mines, the lessees of the mines were instrumentalities of the Government and could not be subjected to a State occupation or privilege tax.

"*Indian Oil Co. v. Oklahoma* (1916), 240 U. S. 522, held that oil leases in Oklahoma made by the Osage Tribe were under the protection of the Federal Government; that the corporation owning the leases was a Federal instrumentality and that therefore the State could not tax its interest in the leases, either directly

or by taxing the capital stock of the corporation owning them.

"*Jaybird Mining Co. v. Weir* (1926), 271 U. S. 609, held that where mining land was leased by incompetent Indian owners with the approval of the Secretary of the Interior, in consideration of royalty in kind, a State ad valorem tax assessed to lessee on ores in bins on the land, before sale or segregation, was void as an attempt to tax an agency of the Federal Government.

"*Howard v. Gypsy Oil Co.* 247 U. S. 503, and *Large Oil Co. v. Howard*, 248 U. S. 549, were cases wherein the Supreme Court of the United States granted injunctions against the State authorities attempting to enforce the State gross production tax laws against the oil company lessees of restricted Indian lands.

"*Choate v. Trapp* was a case involving lands of allottees of the Five Civilized Tribes. The Supreme Court of the State (28 Oklahoma 517) held the subject matter taxable. The case was appealed to and reversed by the Supreme Court of the United States, 224 U. S. 665, that Court holding the lands nontaxable.

"The case of *Gillespie v. Oklahoma* was a case wherein the State supreme court sustained the State income tax as applied to the net income of Frank Gillespie, an individual oil operator, under a restrictive Indian lease. The *Gillespie* case was reversed by the Supreme Court of the United States on appeal, that Court holding the net income derived from the sale of oil and gas was nontaxable; that such a tax would constitute an unlawful burden upon a Federal instrumentality and thereby cripple the arm of the Government in administering the fortune of the Indian. See 81 Oklahoma 803; 257 U. S. 501.

"It may be interesting to note that on the 7th day of March, 1938, the Supreme Court of the United States reversed the *Gillespie* case, *supra*, in the case of *Holivering, Cmr. of Int. Rev. v. Mountain Producers Corporation*, No. 600, October 1937 term, not yet officially reported. The reversal of the *Gillespie* case overturns

a long line of cases and vindicates the authorities of the State of Oklahoma and restores the rule announced by the Supreme Court of Oklahoma a decade and a half before.

"The foregoing references to the statutes and an examination of the foregoing authorities will be sufficient to show that the State of Oklahoma has made an earnest effort to collect taxes from restricted Indian properties and that such efforts have uniformly been denied the State through the official agencies of the Federal Government."

The learned counsel who prepared the exhaustive brief on behalf of the Department of the Interior also burdens the brief with a showing of an amount of money which has been appropriated by the Government to pay certain expenses of Indian local governmental protection, amounting, in truth, to a mere pittance as compared with the cost to the State of the tax exemptions which now run in excess of one hundred million dollars since statehood. As a result of *Choate vs. Trapp*, the entire school system of eastern Oklahoma would have been paralyzed and would have collapsed had it not been for the fortuitous discovery of oil. These matters are fully dealt with in the Report referred to by counsel and the consideration of the report on this hearing and the arguments of the representatives of Oklahoma is respectfully recommended to the court. Copies are available at the Senate Indian Affairs Committee.

**The Kansas and Dakota Indian Cases Preceded the Case of Choate v. Trapp, Where Title Was in the United States.**

In support of the Government's contention of the lack of power in the State to levy the tax, much attention is devoted to the cases of *Kansas Indians v. Johnston County*, 5 Wallace 737, 18 L. Ed. 672 and *United States v. Rickert*,

188 U. S. 432, on the authority of which cases, at least in part, the case of *Choate v. Trapp*, 222 U. S. 665 was decided. For the purpose of distinguishing those cases, we call attention to the important fact that at the time of the decision in the *Choate* case, the United States had divested itself of every vestige of title, legal and equitable, long prior to the granting of the tax exemption and the Oklahoma Indians were no longer under the tribal protection of Congress, but citizens of the State of Oklahoma when the tax exemption became operative, whereas in the cases of the Kansas Indians and in the *Rickert* case, relied on in *Choate v. Trapp*, the Indians were members of original tribes and were not citizens of the State which sought to levy the tax. In *Choate v. Trapp*, the Supreme Court said:

“The provisions that the land should be non-taxable was a property right, which Congress undoubtedly had the power to bestow. The right fully vested in the Indians and was binding on Oklahoma. *Kansas Indians vs. Johnston County*, 5 Wall, 737, 18 L. Ed., 672; *United States vs. Rickert*, 188 U. S., 432, 47 L. Ed., 532.”

It is well settled that a second grant by the United States is void. Since the court held that the tax exemption is a property right, it appears that the court may have overlooked the fact that there was no title in the United States at the time the tax exemption was undertaken. The Federal policy with regard to Indian tribes is also well settled. Certain tribes exchange their title at occupancy for a grant in fee simple. The Five Civilized Tribes were of this class. Other western Indians were granted lands under the General Allotment Act of February 8, 1887, 24 Stat. 390. These were reservation Indians who owned no land. The Government placed them on public lands, furnished them stock, tools and seed for farming, issuing a trust patent, retaining

the legal title in the United States. The act provided that until the Indians so allotted had acquired title in fee simple they were "subject to the exclusive jurisdiction of the United States;" but also provided that when fee simple title had been conferred, "all restrictions as to sales, incumbrances and taxation shall be removed."

The Indian involved in the *Rickert* case was of this class. He held under a Trust Patent.

It is obvious that for a State to attempt to tax land under such conditions would be a violation of the Constitution and laws of the United States. It would appear equally obvious that such land became subject to taxation when fee simple title was conferred and citizenship acquired.

The Ordinance of South Dakota, where the *Rickert* case arose, was drawn in compliance with the terms of the General Allotment Act and after providing against taxation, made this provision, which is quoted in the report of the *Rickert* case:

"But nothing herein or by the Ordinance herein provided for, shall preclude the State from taxing, as other lands are taxed, land owned or held by any Indian who has severed his tribal relations and has obtained from the United States a title \* \* \* which vests the Indian with title in fee-simple, that is with absolute ownership."

But the land of the Oklahoma Indians was not in this status, when, in *Choate v. Trapp*, the court relied on the *Rickert* case.

In the *Rickert* case, the Supreme Court stated that the Indian there involved could not contract as to the lands, nor do anything else than occupy them; that the tax levy was "a cloud on the title of lands of the United States"; and as to the class of title, the court held:

"The United States retained the legal title giving the Indian Allottee a paper or writing improperly



called a patent, showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee.

"Until a regular patent conveying the fee was issued to the several allottees, it would follow that there was no power in the State of South Dakota, for State or Municipal purposes, to assess and tax the lands in question until at least the fee was conveyed to the Indians."

The Oklahoma Indian had severed his tribal relations and had received from the United States a grant vesting him with title in fee. Wherefore the rule announced in the *Rickert* case should not apply.

At the time the *Rickett* case was cited in *Choate v. Trapp*, as a precedent upon which to restrict the sovereignty of Oklahoma, the Oklahoma Indians not only owned their land in fee simple, but were citizens of the State and free from any control of the Congress, save a guardianship (which is not a property right) and they were the recipients of the benefits of state taxation. The land not only was not even held in trust by the United States, when *Choate v. Trapp* arose, but, the court there stated that, prior to allotment, the "legal title was in the tribe for the common use of the members," and that under the Act of Congress the lands were all alienable five years from date of patent. The court then said:

"Most, if not all, of the patents had been issued, and much of the land was alienable, and all of it non-taxable on November 16, 1907, when Oklahoma was admitted into the Union."

Since the tax exemption is admittedly a property right, and since the general government had parted with both legal and equitable title, it would appear that the United States could confer no such added property right without adding a second grant to land already granted in fee simple.

In *Best v. Polk*, 18 Wall 112, the Supreme Court announced the rule that:

“If the thing granted was not in the grantor nothing passes to the grantee.”

The fact that the court in the *Rickert* case quoted the rule announced by Chief Justice Marshall in *McCulloch v. Maryland*, avoiding a conflict of sovereignty and the repugnancy of one sovereignty seeking to control the Constitutional measures of another, evidenced that the court there considered that these fundamental principles of State Sovereignty applied to Indian citizens after such citizens have been clothed with the rights and were bound by the duties of citizenship.

The case relied on by the Supreme Court on the exact point that the tax exemption, conferred by the United States, was binding on the State of Oklahoma, involved the Kansas Indians of the Shawnee Tribe, 5 Wall 737.

These Indians were removed from east of the Mississippi River about the same time the Five Civilized Tribes were removed. As with the Oklahoma Indians, they too were granted lands in fee simple and guaranteed that they would never be embraced in a State without their consent.

By subsequent agreement, the Kansas Indians ceded to the United States all their land and the United States reconveyed to them two hundred thousand acres and gave them annuities and other property for the land over and above two hundred thousand acres. This was one and the same transaction.

In this readjustment the Indians were given the option to take their share in severalty and some of them took advantage of same, but remained subject to tribal laws.

The State of Kansas, while admitting that the land held in common could not be taxed, sought to tax the land held in severalty.

When that case arose in 1867, the tribal government was still intact, and the tribe was still on a treaty making basis. They had elective chiefs and elective council and kept a written record of governmental acts. They were within, but not a part of, the State of Kansas and not subject to the jurisdiction of State laws.

The Kansas Act of Admission, as quoted in stating the case, provided as follows with respect to the tribal lands:

"All such territory shall be excepted out of the boundaries and constitute no part of the State of Kansas, until said tribe shall signify their assent to the President of the United States, to be included in said State."

If the land of the Five Civilized Tribes of Oklahoma, or of any one of them, had been included within the territorial borders of the State of Oklahoma, with the specific provision on the Enabling Act that it "should constitute no part of the State," as was the case with the Kansas Indians; if the Oklahoma Indians so embraced within such State confines had remained a distinct people "capable of making treaties with the United States"; if they had remained under the protection of the United States with their tribal government intact, as was the case with the Kansas Indians; and if under such situation the State of Oklahoma had sought to tax such Indian land for State purposes, in such event the Kansas Indian case would have furnished a binding precedent in a case such as *Choate v. Trapp*.

It would have been true without a specific Congressional tax exemption. The Constitution itself would have furnished ample authority for suppressing such attempt at State taxation.

We know of no case prior to the decision of *Choate v. Trapp* in which the tax exemption was upheld where a title to the land had completely passed from the United

States and vested in the Indian a fee simple or absolute title. At the time of the exemption imposed as to the Five Civilized Tribes Songress, by Act of March 3, 1901, 31 Stat. 1447, had bestowed upon every Indian in the Indian Territory full citizenship in the United States, "entitling him to all of the rights and privileges and immunities of such citizens."

Section 2 of the Oklahoma Enabling Act, 34 Statutes At Large 268, conferred upon the Indians the powers of citizenship to vote for delegates to the constitutional convention and to serve as such.

We point out the above distinguishing features as to the Kansas and Dakota cases cited by counsel for the Government in this case for the purpose of showing that it is a distinctly different proposition to invoke the tax exemption in favor of lands belonging to the United States than it is to impose such exemptions upon lands which have for many years been owned in fee simple by the Indian, who was a citizen of the taxing state on an equality with all other citizens and enjoying all the benefits of government. The tax exemption should not be further extended to include inheritance or estates taxes.

### **Terms of the Enabling Act.**

It is significant neither the Enabling Act nor the acceptance of same by the State Constitution made any direct mention of the Indian tax exemption. Section 1 of the Enabling Act, 34 Stat. 267, provided that the inhabitants of Oklahoma territory and Indian territory "may adopt a constitution and become the State of Oklahoma provided that nothing contained in said constitution shall be construed to limit or impair the rights of citizens or property pertaining to the Indians of said territories, so long as such right shall remain unextinguished, or limit or affect the authority of the United States to make any laws or reg-

ulations respecting such Indians, their lands, property or other rights, by treaties, ~~agreements~~, law or otherwise which it would have been competent to make if this Act had never been passed."

### **Acceptance of the Enabling Act.**

The Constitution of Oklahoma, Section 28, Article 24, provides:

"The terms and provisions of an Act of Congress, to enable the people of Oklahoma and Indian Territory to form a Constitution and be admitted into the Union on an equal footing with Original States are hereby accepted."

The acceptance was made in the light of the Constitution as construed by the Supreme Court of the United States, and the guarantees of that instrument were engrafted on to the Act of Acceptance by Operation of law.

As to the Five Civilized Tribes, there were no treaty rights involved, since they were at that time not on a treaty-making basis, so such language must have been merely copied from earlier cases such as Kansas or South Dakota, which dealt with organized tribes within those States, and referred to remnants of organized tribes that still existed on Indian Reservations other than the Five Civilized Tribes.

It is likewise significant that Section 3 of the Enabling Act, 34 Stat. 269, carries the mandate that the proposed State disclaim all right to unappropriated lands within its boundaries and all lands held by Indians, and in the same paragraph prohibits the levy of a State tax on *lands belonging to the United States, and made no mention of exempting Indian lands.*

The Act of Admission specifically required that the future State should

(1) adopt the Constitution of the United States as the supreme law;

- (2) relinquish all unappropriated public lands;
- (3) provide that *lands of the United States should not be taxed*;
- (4) provide for prohibition in the areas formerly constituting Indian Territory, and
- (5 fix the capital of the State at Guthrie until 1913.

All of these mandates were specifically complied with by the provisions of the Oklahoma Constitution, except the mandate seeking to locate the capital at Guthrie.

The Act did not specifically mention Indian tax exemption but provided only for the preservation of the rights of the Indians as long as they remained unextinguished. As to the capital location provision, this Court held the same void because it interfered with the exercise of the sovereign right of the State.

It would appear that to prohibit the taxation of property within the territorial jurisdiction of the State, owned by citizens of the State, would likewise be beyond the power of Congress as an interference with the sovereign right of the State. We know of no greater internal sovereign power enjoyed by a State than that of taxation for its support and existence.

The application of the doctrine pronounced by Chief Justice Marshall, that the power to tax involved the power to destroy; the power to destroy renders useless the power to create, when applied as a basis to destroy the right to tax, may, indeed, and in the case of Oklahoma has, worked the greatest hardship and has brought about the injustice of exacting from the taxpaying citizens of such State the cost of the exemption afforded to the Indian by the Federal Government.

When we consider that the Indian is a ward of the Federal Government and not a ward of the State of Oklahoma,

it would appear that justice would require that the burden of the privileges and immunities bestowed upon the Indian be distributed among all the States and not exacted from the tax paying citizens and property of a single State.

The foregoing is called to the notice of the Court for the purpose of trying to show that the tax exemption should not be extended through judicial interpretation of Acts of Congress wherein there is no specific exemption provided and under circumstances which have been held to be within the complete control of Congress to declare its intention by specific and express inhibition. There is no such specific or express inhibition against the levying and collection of an inheritance or estates tax.

### **The Inheritance and Estates Tax Should Be Distinguished From Ad Valorem or Other Property Taxes.**

The various treaties, Statutes and decisions cited by counsel for the Government support the contention that it has been the policy of the Federal Government from the beginning to exempt from taxation allotted lands and restricted property of Indians so long as restrictions remain. These authorities, however, fall far short of sustaining the position that such policy precludes the State from assessing an estate tax against the transmission of these estates upon the death of the Indian.

A general exemption exempting property from taxation does not preclude the assessment of an estate tax. It has frequently been so held. In the case of *United States Trust Company v. Helvering*, 307 U. S. 57, the Court held that since an estate tax is not a tax upon property, but is an excise upon the transfer or shifting in relationship of property at death, the Federal Government in assessing an estate tax on the transmission of the estate of a deceased War Veteran could, in computing the tax, include in the gross value of the Estate an insurance policy issued under the



World War Veterans' Act, notwithstanding such policy was expressly exempted from taxation by the Act. It is also held in the above case and in cases therein cited that in assessing an estate tax the value of the Government bonds may be included in the measure of the tax notwithstanding such bonds are expressly exempt from taxation under the Statute.

It has also repeatedly been held that a State in assessing a corporation license tax against a corporation for the privilege of doing business in the State might include in the measure of the tax the value of Government bonds notwithstanding such bonds are expressly exempt from taxation by Federal Statute.

*Tradesmen's National Bank v. Oklahoma Tax Commission*, 309 U. S. 560 and cases therein cited.

In the case of *Landman v. Commissioner*, 123 Fed. (2d) 787, the Circuit Court of Appeals of the Tenth Circuit held that the Government in assessing an estate tax upon the transmission of the estate of a full blood Creek Indian, might include in the measure of the assessment the value of restricted and non-taxable land. In that case the controversy was between the Treasury Department seeking to collect the tax on the one hand, and the Department of the Interior opposing the tax, on the other. The same contention was made by counsel for the Interior Department as is made here, the same treaties were relied upon. It was there contended that the various treaties between the Federal Government and the Indian Tribe relative to non-taxation of restricted lands precluded the Government from assessing an estates tax on the transmission of such estates. It was contended that the non-taxation provision of such treaties created in the Indian such a vested right that the Federal Government could not constitutionally abrogate and that the assessment of such tax violated the Constitutional rights of the Indian. This proposition was denied by the

Court, and after some discussion of the proposition and citing authorities, the Court concluded as follows:

"When considered in this light it is plain that the exemption from taxation accorded the Creek Indians such as the decedent, cannot be extended to the imposition of a tax on the transfer of the net estate of a decedent dying after the enactment of the Act. This is made more abundantly clear by the decisions which have defined the nature and character of the estate tax as an excise tax upon the shifting of the economic burdens and benefits on or the privilege of transferring property of decedent at death. \* \* \*

"There is nothing in the treaties or the Acts of Congress confirmatory thereof which prohibits the imposition of a tax on the right to inherit or succeed to non-taxable property rights. Here the tax falls upon the transfer or shifting of the economic benefits and not on the property of which the Estate is composed. It is therefore not within any constitutional immunity growing out of a contract or agreement between the United States and the Creek Indians as characterized by the Act of April 26, 1906."

What is there said applies with equal force to the case at bar. The treaty obligations between the Indian and the Federal Government especially the provision as to non-taxation, is just as binding upon the Federal Government as it is upon the State, and if such provision does not preclude the Federal Government from assessing an estate tax against the estate of these Indians, neither will it preclude the assessment of such tax by the State.

### **Statutory Lien No Bar to Tax.**

The Oklahoma statutory lien is no bar to the tax asserted in the instant case. At page 80 of the Government's brief it is contended that the provision of the Oklahoma law making the tax a lien on the property of the taxpayer casts a

cloud upon the title of all Indian lands similarly situated in Oklahoma. Of course, the question is not pertinent to this case for the reason that the tax has already been paid under protest and is held by the State authorities pending the decision of this Court as to the validity of the tax.

The payment of the tax renders impossible attachment of the lien to the property of the taxpayer.

As to the probable effect of the statute on other cases not before the court, it would appear that those cases, if they arise, would be dealt with under the circumstances as presented. However, a complete answer to the contention seems to lie in the fact that if the restricted property of the Indian is immune from sale under the foreclosure of the tax lien, then the law does not apply to that property which is so exempt from sale and cannot constitute a cloud upon the title.

In states where the homestead tax exemption obtains, the general statutes making taxes a lien on all the property of the taxpayer do not apply to, nor cast a cloud upon the title of, tax exempt homesteads. We are not unmindful of the holding in the cases cited in the brief of the Government, but we are confident of the correctness of the principle that exempt property from a given process such as execution, mortgage foreclosure or the foreclosure of a tax lien, could not be clouded in title by the laws of the State fixing liens to aid in the execution of any of such processes.

In the case before this Court, it would not be inappropriate and would satisfy the contention of the Government, if in sustaining the validity of the tax, property of the taxpayers which may be exempt from the enforcement of a tax lien should be so declared and protected. In other words, the court could sustain the tax and at the same time limit the operation of the opinion so as not to extend the processes of the tax lien to property of the Indians which would be exempt from forced sale. Of course, as stated,

such a problem does not arise in this case because the tax has already been paid.

It is always to be presumed that the judgment of the court sustaining a tax will be complied with and that the taxpayer would pay the tax, and that such processes to enforce the collection in case of non-payment would be according to law, and that the State officers would be presumed to do their duty and not attempt to unlawfully enforce a tax lien against property exempt therefrom. The cases holding that a general tax lien creates a cloud upon the title of exempt property, appears to us to be based upon an imaginative premise unsupported by any principle of law. The inability of the State to enforce a tax lien against property of the taxpayer does not within itself invalidate the tax. The only constitutional guarantees as to uniformity of taxation relate to the assessment of the tax and not to its collection or enforcement. See *Montana Nat'l Bank v. Yellowstone Co.* (Mont.) 252 P. 876; *Ewarts v. Taylor*, (N.D.) 160 N. W. 798; *Grassfeld v. Baughman*, (Md.) 129 A. 370.

Wrongful efforts at enforcement may be stayed by appropriate processes and in most instances damages for wrongful levy upon exempt property would be available to the taxpayer.

It is not within the province, of the court to declare a general tax lien a cloud upon the property of the taxpayer which is exempt from the lien merely out of conjecture or fear that some unlawful attempt would be made to enforce the tax lien.

In any case before the court, as above stated, where there was no property immediately available to pay the tax other than exempt property, the court in its decree could limit the decision to the validity of the tax and expressly declare that such exempt property was not affected by the decision and that the lien did not attach thereto and that no cloud

was thereby cast thereon. Such procedure would in every instance clarify the situation.

There is no Indian property restricted from sale which does not require the approval of either the Secretary of the Interior or some other agency of the Government, and there is no common commerce with such property such as to make the existence or nonexistence of a tax lien as a cloud thereon a considerable factor. In other words, it is wholly protected while restricted and after restrictions are removed and the land becomes taxable, then the subsequently acquired lien law should properly apply to any future tax.

Until a case arises wherein an attempt to unlawfully enforce a tax lien against exempt property is made, we think any serious consideration of that possibility premature.

We are at this time unadvised as to the exact processes of collection of the Federal Estates and Gift taxes against Indian estates where there would be no trust funds available to pay same and the deceased left only restricted land. We assume in that case, of course, the Secretary of the Interior could remove the restrictions and sell enough of the Indian's land to pay the Federal tax.

We do not know what consolidation it would be to the Indian that such tax was exacted by the Federal Government and his land sold therefor as against the same procedure by the State, except, of course, the State cannot sell the land. The Federal collection processes, we can well imagine, would constitute as effective a cloud over the title of deceased Indian estates as that of the present State statute of Oklahoma which, as we have stated before, does not apply to land which is nonsalable. The exemption runs to forced or involuntary sales as well as voluntary conveyances.

A judgment for the payment of a tax, where the property is under guardianship or control of some agency immune from execution, or where the tax is against governmental subdivisions or states or even the Federal Government may be paid by appropriation, which is usually made to pay such judgments; and the presumption always follows that any Government or governmental agency would pay a judgment, and in Indian cases, that the Congress would if necessary appropriate money or make already existing funds available to satisfy the tax.

(The foregoing part of brief was prepared before argument and the additional portion after the argument by permission of the court.)

### **Questions Arising During Argument.**

The Government has eliminated all contentions as to invalidity of the tax on the theory of burdening a Federal instrumentality and abandons specifically the proposition of a contention heretofore made that the transmission of the State must be by virtue of the laws of the State of Oklahoma as distinguished from being derived through the laws of the United States Government or both, and admits that it would be immaterial as to which law operated to devolve or transmit the estate. And all other questions heretofore presented and argued except the following:

(1) That the Oklahoma statutes under which the tax is sought to be collected does not apply and was not intended by the Oklahoma Legislature to be applied to restricted Indian inheritances.

(2) That taking all of the Acts of Congress into consideration, the previous decisions of the Court as a group, Departmental and contemporaneous construction throughout the years, that it has been the policy of the general Government, Congress and the Federal Courts to hold all restricted Indian property immune, rather than exempt, from all manner of State taxation.

In other words, it is now the contention of the Government, accepting the viewpoint of the Indian Bureau of the Department of the Interior, that the subject matter of taxation of Indian restricted properties or the income therefrom or the inheritances thereof, are outside of the taxing jurisdiction of the State.

Counsel stated in the argument yesterday that it was anomalous that the Federal Government could tax this subject matter, but that the States could not, and stated that that was the case, however, and seemed to be of the opinion that there was no legal reason which could be given therefor. The confusion of the Government's counsel lies in this fact. The Acts of Congress spoken of by him referring to the lands as "tax exempt," "non-taxable," "not subject to taxation," etc. were not distinguished by him from the principle of Federal taxation of its own instrumentalities in the absence of a specific tax exemption which would be permissible, but at the same time would be prohibited to the States. In other words, the Federal Government can tax its own instrumentalities and the State cannot, to the extent of burdening same. The State can tax its own instrumentalities, but the Federal cannot, to the extent of hampering the State Government. Especially was this true and held by the court prior to *Mountain Producers* case and the overruling of the *Gillespie* case, cited and discussed in all the former briefs filed herein.

A very different status obtains, however, when the Act of Congress said in plain, unqualified words that the lands, and it was referring to the lands only, should be non-taxable. Non-taxable meant non-taxable by the Federal Government as well as by the State Governments. What the Indian was seeking in the treaties was immunity from taxation. It did not make any difference to him whether he would have paid the taxes to the Federal Government or to the



States. Furthermore, as pointed out in the oral argument, at the time of the tax exemptions all of the earlier exemption statutes mentioned by the Government's counsel, under the prevailing treaty conditions with the Five Civilized Tribes, the Indians were guaranteed against being incorporated within any State of the Union or made a part thereof. Until that treaty was abrogated, how can the tax exemption have been directed to the States when, if the Indians and their reservations were not to be incorporated within the boundaries of any State, there would be no State which could tax the same? So, since the doctrine of immunity on the "instrumentality" theory has been modified by the *Producers* case and has completely been abandoned by the Government in this case, there is no valid ground upon which the exemption can be maintained. While all tax exempt laws in favor of the Indians are to be construed liberally, contrary to the general rule, this doctrine does not mean that implied exemptions or assumed exemptions may be read into the statutes of a governmental policy. There must be specific statutory exemptions in the first place before a construction can apply.

**The State Has Had No Compensation or Reimbursement of a Substantial Nature to Replace Losses From Tax Exempt Land.**

Counsel for the Government states that the State of Oklahoma had received from Congress more money on account of Indian exemptions of property in that State than it had lost. We do not doubt the sincerity of counsel in making this statement, but it is far from the fact. The State of Oklahoma has (not by any estimate or speculation, but by careful calculation of trained tax men, skilled beyond the ordinary ability, and specialists in that field) sustained a loss of in excess of \$125,000,000.

The figure has been definitely established and proven in various hearings before the Committee on Indian Affairs of the Senate. We regret that we do not have the figures available at this moment, but our thorough knowledge of the conditions in Oklahoma in this respect warrants us in stating that there has never been any substantial, direct appropriation inuring to the general government of the State or its subdivision by way of reimbursement or compensation for the losses of taxes from Indian exempt properties, and most of the small amount, not exceeding a very few million dollars at the most, total appropriations since statehood, has gone to certain specified Indian institutions maintained by the Government in Oklahoma on reservations of other remnants of Indian tribes. A few cents per head, not exceeding 10 cents, as we remember it, has been paid to some school districts for the attendance of Indian children, at a cost to the district of more than \$1.00 per head. So the claim that Oklahoma or any of its legal subdivisions has been in any wise substantially compensated for the loss is the wildest sort of conjecture.

There has always been an amazing delusion on the part of those who are not intimately informed that somehow the Federal Government has maintained the Indians in Oklahoma. The Federal Government has not maintained 10 per cent of the cost of affording Government facilities, schools, education, roads, highways, courts and all other protections provided the Indian in Oklahoma, but all of that has virtually been performed and paid for by the tax-paying citizens of that State.

The institutions maintained strictly for the Indians in Oklahoma and paid for by the Government have amounted to a negligible sum, because the ordinary facilities of the State available to its population in general would have absorbed those small additions without appreciable cost or inconvenience. And furthermore, in this respect, it may be

called to the Court's attention that in each instance surrounding every institution of the character named, there is a vast domain of property held off the tax rolls.

The matter of how much money has been appropriated by the Congress to the State of Oklahoma and its subdivisions on account of the Indian exemptions appeared to impress members of the Court as having some significance. We, therefore, out of respect to that inquiry, attach to this brief as an appendix, copies of the hearing before the Committee on Indian Affairs on Senate Resolution No. 168, referred to by counsel for the Government, and also copy of hearing on Senate Joint Resolution No. 109. At page 28, under the title of "Loss of Revenue" of Senate Resolution No. 168 reference is made to the testimony of Mr. Crane, one of the best ad valorem tax experts in the United States, a man of long years of experience and of the highest type of conservative judgment, wherein he states, after making certain observations:

"On this basis the total amount which would have been taxable is \$75,014,174."

On another basis of figuring, the following statement occurs:

"The total on that basis is \$75,556,532, or very close to the estimate."

It will be noted that the foregoing does not include lost income tax, and gross production tax on oil and gas, which amount to many millions of dollars additional.

The claim of the substantial loss to the State of Oklahoma and its taxpayers on account of the tax exemption, that the figures run over \$100,000,000, represents no idle assumptions or dreamlike estimations. It is the stern, cold and cruel truth, which cannot be laughed off or "crushed to earth" by statement from the counsel for the Government that "the

State has received more"—(here counsel corrected) and stated the State has received as much compensation by appropriations from Congress as it has lost by the tax exemption.

### **Additional Statement of Facts.**

It was pointed out in the oral argument that as to two of the estates here involved, there was included in the gross value thereof certain property which was taxable at the time of the death of these Indians.

In case No. 623, Estate of Lucy Bemore, it appears that she was at the time of her death, the owner of 43 acres of land which was purchased for her by the Secretary of the Interior out of restricted and trust funds under his control, and that title to the land was taken in her name under restricted form of deed. The value of this property was assessed by the Tax Commission at \$3,000 (R. 18-19).

This property was purchased prior to the passage of the Act of January 27, 1933, and is, therefore, taxable. It is conceded by the Government that this tract was taxable at the time of the death of Lucy and the value thereof was properly taken into consideration in estimating the gross value of the estate for the purposes of estate taxation.

In case No. 625, Estate of Wosey Deere, it is shown that at the time of her death she was the owner of 160 acres of land inherited by her from her grandmother. It is also conceded that this 160 acre tract was taxable at the time of her death. This tract was valued for tax purposes at \$800 (R. 100).

It is further shown that she was also the owner of United States bonds which were purchased for her account out of the proceeds from the sale of oil and gas produced from such tract. These were valued for tax purposes at the sum of \$295,304.38 (R. 101).

These items, therefore, were properly included in the gross value of her estate for the purposes of estate taxation.

It also appears that she was at the time of her death owner of certain miscellaneous items (R. 101). The source from which these items were procured is not shown by the record. It is, therefore, impossible to determine whether or not such items were properly included in the value of the gross estate, if it be held that restricted property and non-taxable items cannot be included therein.

In such event it would be necessary to remand the case to the United States District Court for the Eastern District of Oklahoma for the purpose of having the tax recomputed.

Respectfully submitted,

B. L. MITCHELL,

A. L. HERR,

C. W. KING,

*Attorneys for Oklahoma Tax Commission.*

*Petitioner.*

Address: Okla. Tax Com., Capitol, Oklahoma City, Okla.

# LOSS OF REVENUE—TAX EXEMPT INDIAN LANDS

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## HEARING BEFORE THE COMMITTEE ON INDIAN AFFAIRS UNITED STATES SENATE

SEVENTY-FIFTH CONGRESS

THIRD SESSION

ON

### S. Res. 168

A RESOLUTION AUTHORIZING THE COMMITTEE ON INDIAN AFFAIRS OR ANY SUBCOMMITTEE THEREOF TO HOLD HEARINGS TO DETERMINE ALLEGED LOSS OF REVENUES SUSTAINED BY CERTAIN STATES DUE TO EXEMPTION FROM TAXATION OF INDIAN LANDS AND OIL AND GAS AND OTHER MINERALS FROM SUCH LANDS, PRESCRIBING THE DUTIES OF SAID COMMITTEE, AND AUTHORIZING SAID COMMITTEE TO DETERMINE THE AMOUNT OF SUCH LOSS SUSTAINED BY SUCH STATES

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MAY 6, 1938

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Printed for the use of the Committee on Indian Affairs



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## LOSS OF REVENUE—TAX-EXEMPT INDIAN LANDS

FRIDAY, MAY 6, 1938

UNITED STATES SENATE,  
COMMITTEE ON INDIAN AFFAIRS,  
Washington, D. C.

The committee met, pursuant to call, at 10:40 o'clock a. m. in room 424a, Senate Office Building.

Senators Thomas of Oklahoma (chairman), Wheeler, Ashurst, Bulow, Hatch, O'Mahoney, Donahey, Chavez, Johnson of Colorado, Lundeen, Frazier, and Shipstead were present either in person or by proxy.

Present also: Senator Lee, Hon. Robert L. Owen, Hon. Scott Ferris, Hon. James V. McClintic, Hon. Paul A. Walker, Clifford W. King, Esq., special counsel for the State of Oklahoma; and Mr. B. D. Crane, deputy tax commissioner, State of Oklahoma; Assistant Commissioner of the Bureau of Indian Affairs, William Zimmerman, Jr.; and S. M. Dodd, Budget officer, Bureau of Indian Affairs.

The CHAIRMAN. The Chair lays before the committee Senate Resolution 168, a resolution authorizing the Committee on Indian Affairs or a subcommittee thereof to hold hearings to determine alleged loss of revenues sustained by certain States due to exemption from taxation of Indian lands and oil and gas and other minerals from such lands, prescribing the duties of said committee, and authorizing said committee to determine the amount of such loss sustained by such States.

The resolution itself will be made a part of the record at this point. (Senate Resolution 168 is as follows:)

[S. Res. 168, 75th Cong., 1st Sess.]

RESOLUTION Authorizing the Committee on Indian Affairs or a subcommittee thereof to hold hearings to determine alleged loss of revenues sustained by certain States due to exemption from taxation of Indian lands and oil and gas and other minerals from such lands, prescribing the duties of said committee, and authorizing said committee to determine the amount of such loss sustained by such States.

Whereas the State of Oklahoma and other States under the terms of the enabling Act, by which such Territories were admitted to statehood, as interpreted by the courts of last resort, the State of Oklahoma and other States have been deprived of the right to tax Indian lands within such States and oil and gas and other minerals from such Indian lands (including the oil producers' share as well as the Indians' share) under the supervision and regulation of the Department of the Interior of the United States, resulting in a loss of revenue by such exemption from taxation of the lands and minerals located within the State of Oklahoma and other States; and

Whereas, as a result of such immunity extended to the Indians and the lessors of Indian lands, the State of Oklahoma and other States have sustained a loss of substantial revenues which was required to be compensated by increased taxes on the remaining property belonging to the taxable citizens of such States for the support and maintenance of the State government; and

Whereas the State of Oklahoma and other States have provided school facilities, police protection, and highways and maintained courts of justice, recording offices,

and other facilities of government which have been available to the Indians as well as to the other citizens of such States, all at the expense of the taxpayers of the respective States; and

Whereas the Indian is a ward of the United States and is not a ward of the State of Oklahoma or other States, and all of the immunities, privileges, and exemptions which the United States has deemed proper to accord the Indian should be a charge upon and borne by all of the States or the General Government and not by the property of the taxable citizens of any given State; and

Whereas, by depriving the State of Oklahoma and other States of the right to tax such exempted property, such States have been deprived of an inalienable sovereign power: Therefore be it

*Resolved*, That the Committee on Indian Affairs, or any duly authorized subcommittee thereof, is authorized to make an investigation of the relationship between the Federal Government and the governments of the several States and political subdivisions thereof in which there are located Indian reservations or unallotted Indian tribal lands, or any other Indian lands which have not been subject to taxation by such States or political subdivisions, with a view to a fair and equitable reimbursement to said States and/or political subdivisions.

For the purposes of this resolution the committee, or any duly authorized subcommittee thereof, is authorized to hold hearings, to sit and act at such times and places during the sessions and recesses of the Seventy-fifth and succeeding Congresses until the final report is submitted, to require by subpoena or otherwise the attendance of such witnesses and the production of such books, papers, and documents, to administer such oaths, and to take such testimony as it deems advisable, and at the conclusion of such hearings said committee shall make a report of its findings to the Congress: *Provided, however*, That the cost of presenting evidence and testimony to such committee incident to the establishment of the amount of loss sustained by any State shall be borne by such State without expense to the United States.

The CHAIRMAN. The chair now lays before the committee a copy of the report of the Secretary of the Interior upon this resolution. I will ask that this report be here made a part of the record.

(The report of the Secretary of the Interior is as follows:)

THE SECRETARY OF THE INTERIOR.

Washington, October 9, 1937.

HON. ELMER THOMAS,

*Chairman, Committee on Indian Affairs,  
United States Senate.*

MY DEAR SENATOR THOMAS: Further reference is made to your letter of August 5, requesting a report on Senate Resolution 168, authorizing the Committee on Indian Affairs to hold hearings to determine the alleged loss of revenues sustained by certain States due to exemption from taxation of Indian lands, etc.

In connection with this proposed study, attention is invited to the fact that at a meeting of the National Emergency Council, on December 17, 1935, the President appointed a committee, composed of the Attorney General, the Secretary of the Treasury, and the Acting Director of the Bureau of the Budget to make a study of the problem arising from the acquisition of real property by the Federal Government and the consequent loss of tax revenues by the States and lesser political subdivisions because of the exemption of such property from State and local taxation. In compliance with Budget circular, dated June 30, 1936, reports showing the area and approximate value of Indian lands and improvements exempt from State and local taxation as of June 30, 1936, were secured by the Commissioner of Indian Affairs and forwarded to the Procurement Division of the Treasury Department for compilation and study. A request from the Director of Procurement is now pending for additions and changes up to and including June 30, 1937, and this information will later be made available. It is understood that the Director of Procurement now contemplates the submission of reports by field units promptly after a change in real property is made in order to keep this data current.

It appears also that a similar study was made by a subcommittee on Indian Affairs in accordance with Senate Resolution 282 and Senate Resolution 432 (71st Cong.) and a copy of the subcommittee's partial report, dated April 13, 1932, is on file in this Department. Presumably, no final action was ever taken on the recommendations of this subcommittee.

While the records will doubtless show that there are some instances in which the States and lesser political subdivisions are disadvantaged by reason of Federal

ownership or control of real estate, in general it is believed that the various States and other political units derive as much benefit from compensating advantages of Federal ownership or control of tax exempt property as they lose in uncollected tax revenues.

Moreover, it is a well known fact that the lands existed as Federal domain before the States were created and the State and county governments were established with full cognizance of this fact. It is hardly consistent for the States now to contend that a loss is sustained in tax revenue because of the existence of such tax exempt property within their borders.

If, after giving consideration to these facts, the Committee on Indian Affairs desires to proceed with a further study of this matter, I have no objection to passage of Senate Resolution 168.

Sincerely yours,

CHARLES WEST,  
*Acting Secretary of the Interior.*

The CHAIRMAN. This resolution is somewhat unusual, and because of its character it occurred to the Chair that the committee should consider the resolution and make a record to see whether or not the committee would be justified in asking that an investigation be made which might be formal and more extensive than we could make at this time.

The resolution is of such a character that the committee could not, in my judgment, just casually consider it and be justified in authorizing its approval; but by offering those who are sponsoring the resolution an opportunity to come before the committee and give the committee the benefit of their investigation and conclusions, if the committee should then see fit to recommend the resolution, it would be fortified with the data that would enable it to defend the resolution. Without such data I am afraid the committee would be unable to defend the resolution.

It is because of that peculiar situation that I have asked the proponents of the resolution to come before the committee and make a rather extended showing. Any showing made here will be available later in the event the resolution should be passed.

I want the record to show that my colleague, Senator Lee, is present. I want the record to show that there are also present former Senator Robert Lee Owen, himself an Indian; former Representative Scott Ferris of Oklahoma, former Representative James V. McClintic; and Paul A. Walker, a member of the Federal Communications Commission.

The record will show that the proponents of this resolution who are present, being representatives of the State of Oklahoma, include Clifford W. King, special counsel for the State of Oklahoma, and Mr. B. D. Crane, deputy Oklahoma tax commissioner and director of the ad valorem tax division, Oklahoma Tax Commission.

While this resolution is supported at this time by the State of Oklahoma and its agencies, still the resolution is Nation-wide in its scope, and if there should be grounds for a case it would not be restricted to Oklahoma, because the same formula and the same procedure applicable to our State would be likewise applicable to other States if there are grounds for claims.

Mr. King, will you please come to the table and have your assistant come with you? We shall ask you to make the first statement.

**STATEMENT OF CLIFFORD W. KING, SPECIAL COUNSEL FOR THE  
STATE OF OKLAHOMA, OKLAHOMA CITY, OKLA.**

The CHAIRMAN. Please state your name for the record.

Mr. KING. Clifford W. King.

The CHAIRMAN. Where do you reside, Mr. King?

Mr. KING. Oklahoma City.

The CHAIRMAN. What is your business?

Mr. KING. Attorney at law. I am now special counsel for the State of Oklahoma. I was for 12 years assistant attorney general of Oklahoma, in charge of tax litigation and for 5 years attorney for the Oklahoma Tax Commission.

The CHAIRMAN. Do you represent any person, agency, municipality, or State in your appearance here today?

Mr. KING. I represent the State of Oklahoma as special counsel employed by the Governor pursuant to resolutions of the Oklahoma Legislature.

The CHAIRMAN. Judge King, if you will, you may proceed to state your case and make it as full as you care to.

Mr. KING. Mr. Chairman and members of the committee, since this case covers the scope indicated by your chairman and is of interest to many more States than Oklahoma, it has been suggested that a rather full picture be presented in my statement to the committee. Therefore, if I may be permitted to do so, I will take about 30 minutes to present a statement of the case as viewed by the representatives of Oklahoma.

This proceeding arises from the fact that the United States admitted Oklahoma to statehood with one-half of its area immune from general ad valorem taxation, and all of the oil and gas and other minerals produced from Indian lands exempt from taxation. The taxable real estate and personal property belonging to the non-Indian citizens have borne the entire burden of establishing and supporting State and local government for the State, including the 44 east side or Indian counties and the school districts embraced therein, all originally exempt from State and local taxation. In addition, there was a large area of Indian lands likewise free from taxation in the western or Oklahoma Territory half of the States. The exemption thus enforced has cost the State of Oklahoma in excess of \$125,000,000 in taxes denied it. The result was increased taxes and maximum bonded debts on the taxable assets of the State, counties, and school districts for the support and maintenance of State and local government. Highways were constructed, courthouses were built, schools erected, and police protection was provided equally available to the Indian population with the other citizens of the State.

The State, erected from the Indian Territory and Oklahoma Territory, was required to accept the terms of the Enabling Act in order to achieve statehood. Nowhere in the Enabling Act, nor in the adopting section of the State constitution, is the exemption from taxation specifically mentioned, and it may safely be said that neither the members of the constitutional convention of the State of Oklahoma nor the people of the State in adopting the constitution realized that in so doing the sovereign right of taxation was being surrendered, or that tax exemption would be enforced upon the State of Oklahoma by and through the agencies of the Federal Government. The State

never voluntarily surrendered the right to tax the land of Indian citizens or the oil and gas and other minerals produced therefrom. Especially it was not conceived by the best minds of the State at the time of statehood that the oil companies and individual oil operators would be immune from taxation of their portion of oil and gas produced from Indian lands. (See p. 12.) Laws were immediately passed levying taxes on such lands and minerals, and an attempt was made to enforce the same. The supreme court of the State on which sat several members of the constitutional convention sustained the right of taxation. The Federal courts denied the right of taxation to the State as applied to both Indian lands and the oil and gas produced therefrom, including the seven-eighth working interest inuring to the oil-producing company and individual operator, on the ground that treaty obligations with the Indians provided for such exemptions, and on the further general ground that taxation by the State of oil and gas produced under leases requiring the approval of the Secretary of the Interior impinged and burdened the instrumentalities of the Federal Government. The theory was that if the lessees (the producing oil companies or individuals) holding under restricted leases were to be taxed upon the proceeds of the oil and gas produced under such leases, such producers would pay less for same and that, thereby, the Indian would receive a less consideration for the lease and that, further, the arm of the Government would be weakened in the exercise of its guardianship over the property of the Indians as its wards.

The position of the State of Oklahoma is that the cost of the privileges and immunities, in the form of tax exemptions extended by the Federal Government to the Indians as its wards, should be borne by the Federal Government and not by Oklahoma alone. The Indian is a ward of the Federal Government and is not a ward of the State of Oklahoma.

The claim for reimbursement for the compulsory forbearance from taxation, of course, covers only the period during which the lands and the oil and gas, respectively, were exempt from taxation. As restrictions were removed on individual Indians, the land, as well as the minerals found therein, became taxable. The act of Congress of April 1921, relating to the Osage Nation, made oil and gas in that area subject to taxation the same as other like production in the State. The act of 1931, applying to the Five Civilized Tribes, rendered the oil and gas in that area subject to taxation after April 26, 1931. This act applied to restricted allotted lands of members of the Five Civilized Tribes and inherited restricted lands of full-blood Indian heirs.

The right of the Federal Government to exempt from taxation lands and personal property belonging to citizens of a sovereign State may be successfully challenged as an unwarranted exercise of power by the Congress, the purpose of this proceeding, however, is to obtain relief through the legislative power rather than through the judicial branch of the Government.

In other words, Oklahoma bases its right of recovery on the moral ground that the Congress will itself right the wrong when the evidence thereof is laid before it. This is an appeal or petition to the conscience of Congress to make restitution for having impaired the highest sovereign power inherent in a State, that of taxation. We do not complain of the exemption of the Indian from taxation. That



policy was a necessary and wholesome one. We only complain at saddling the cost of the exemption on Oklahoma instead of it being shared by all the States.

When a territory is admitted to the Union with one-half of its lands and millions of dollars worth of personal property exempt or immune from taxation by conditions superimposed by the Federal Government, such State is obviously denied admission to the Union on an equal footing with the original States, in violation of the plain terms of the Federal Constitution.

The Federal Government had no title to the Indian lands in Oklahoma at the time of statehood and could not, therefore, grant to the Indian exemption from taxation of such lands. Tax exemption is a property right, and to bestow it upon the Indian at that time, would have amounted to a second grant. The Indian, by act of Congress, was made a citizen of the State of Oklahoma, owning his land in fee simple. The United States by treaty had long before parted with all title thereto, retaining only a restriction against sale except with the approval of the Secretary of the Interior, which restriction was not a property right, but merely entailed the power of guardianship in the administration of the property of these wards of the Government. Through the agencies of the Dawes commission, agreements had been obtained with the various tribes for the allotment of their lands, and as a consideration moving the Indians, they were promised tax-free lands for terms of years varying with each tribe as to amount of land exempted and as to terms of exemption. Congress later passed the various allotment acts, all of which carried tax exemption in accordance with the several agreements.

Congress conferred citizenship upon the Indians, and the Enabling Act empowered them to vote for delegates to the constitutional convention and to sit as members of the convention. The United States, in payment of a national obligation owed by it to the Indian, indemnified him against taxation and made good the indemnity by compelling the State of Oklahoma to forego its land tax and the tax on oil and gas, and, in consequence, compelled the State to accord all the facilities of government to the Indian at the expense of the taxpaying citizens of the State.

Since the matter of tax exemption of Indian lands was not mentioned in the Enabling Act or in the State constitution [except the reference in Sec. 6, Art. 10], Oklahoma was not a party to the exemption. She never ratified or agreed to the exemption; she never received any benefits in compensation for the exemption. The debt paid by the exemption was a liability of the National Government to the Indian, and not a debt of the State of Oklahoma. The tax agreements more correctly amounted to immunity from taxation rather than exemption. Section 6, article 10, Oklahoma Constitution, merely excepted from the taxable property there mentioned such lands as were exempt by treaty or act of Congress and did not attempt to define the scope of exemption, and therefore such provision did not constitute waiver of the State's sovereign power to tax all the property of citizens within its borders.

As shown by compilation by Mr. B. D. Crane, director of the ad valorem division of the Oklahoma Tax Commission and deputy tax commissioner, the ad valorem tax forborne by the State, based upon the tax commission records, and from calculations including certain



estimates, amounts to \$75,566,532; calculations made by the same authority from acreage totals of exempt Indian lands furnished by the Secretary of the Interior, using average value per acre and average tax rate applied to other lands in the State, shows a total of \$75,014,174 in taxes which would have been collected had the lands been taxable.

That is a remarkable closeness of figures to come from two different sources without reference to each other.

From 1908 to 1916 we are not as yet in possession of figures. The Bureau of Indian Affairs is giving us most splendid cooperation and is doing all it can to provide the figures necessary for this hearing, and will continue to do so. We made our request a little late to have the figures as to the Five Civilized Tribes from 1908 to 1916 before you, but that tax was one-half of 1 percent—the gross receipts tax—and does not affect the amount very materially. Just offhand I should say it is 10 or 11 million dollars, perhaps.

From records of the Five Civilized Tribes and the Department of the Interior during the period from January 1916, the effective date of the 3-percent Oklahoma gross production tax act, to July 1931, the royalty payments, plus the seven-eighths working interest, both tax exempt, are as follows:

Cash value:		Tax
Royalty.....	\$60, 249, 378. 80	\$1, 807, 481. 36
Working interest.....	421, 745, 651. 60	12, 652, 369. 55
Total.....	481, 995, 030. 40	14, 459, 850. 91

From reports of revenues derived from oil and gas produced in the Osage Nation from 1908 to 1921, furnished by the superintendent of the Osage Agency, the total production was \$217,493,015.52 on which the tax figured at one-half of 1 percent from 1908 to 1916 and 3 percent from 1916 to 1921 is \$6,471,432.80.

The foregoing does not include the various Shawnee Agency tribes, being the Pottawatomie, Kickapoo, Shawnee, Sac and Fox, and Delawares; the Pawnee Agency tribes, being the Kaws, Tonkawas, Poncas, Otoes, and Pawnees; the Anadarko Agency having jurisdiction over the Concho Agency, consisting of Cheyennes and Arapahoos; and the Miami Agency having jurisdiction over Quapaws and certain other Indians. From the above agencies data has not yet been obtained as to the exact acreage of oil-producing lands from statehood to respective dates when same may have been taxable.

Reference is made to report of the Committee on Indians, No. 1365, Seventy-second Congress, second session, pursuant to Senate Resolution 282 of the Seventy-first Congress, which report is entitled "Tax-Exempt Indian Lands." At pages 8 and 9, the condition confronting Oklahoma counties is set forth as follows:

The Oklahoma counties may be discussed separately. The questions involved in this State are complicated by many factors which are not always present in other States. In Oklahoma we find many questions among restricted and unrestricted Indians, multiplied by related questions which have to do with the degree of blood among the Indians. Moreover, the counties in Oklahoma were Indian country originally; all thereof, and not merely a portion, was originally exempt from local taxation. The coming of white settlers to Oklahoma merely added to the problem, and we are now confronted with many counties in which the population of Indians and Indian breeds, including full-bloods and mixed bloods, is greater than the population of the whites.

The committee has had neither the time nor the authority to make a thorough study of the numerous problems presented by the different degrees of blood; of problems which are suggested by a population in which blood mixtures are grad-

uated by almost imperceptible degrees from pure white to pure Indian, and vice versa.

The problem of tax-exempt land is very complicated in Oklahoma by the fact that there are no reservations outside of the Osage Reservation; the Indian lands, restricted and unrestricted, being interspersed with the property of the whites and generally in a checkerboard effect. The result is, in many counties practically all the roads pass alternately over taxable white-owned land and tax-exempt Indian lands.

Educational services are furnished to whites, mixed breeds, and full-blood Indians alike. The pupils are children of parents some of whom are restricted and some of whom are not restricted. Obviously, no effort can be made in this report to deal with the intricacies of this kind of situation. This does not mean, however, that the committee finds no inequities in the relationship between the United States and the different counties of the State of Oklahoma. On the contrary, most serious maladjustments are encountered in nearly every county of the State. Each year, according to the claims of county officials, the tax loss to the Oklahoma counties, plus the expenditures on behalf of the Indians, is more than \$2,280.

Reference to the tabulation will disclose that the committee obtained complete estimates of tax loss for the year 1929-30, but obtained only a portion of the expenditures made by the counties in behalf of Indians on tax-exempt land.

Certain maps showing the distribution of the restricted Indian land in a number of counties of Oklahoma were transmitted with the report by the chairman of the subcommittee for the permanent files of the Committee on Indian Affairs. They are not published herein on account of the expense of reproducing the colors necessary to make a graphic presentation of the different ownerships. They disclose the serious predicament of the Oklahoma counties. A rather typical county is Mayes County, in which the estimated total value of restricted land is \$807,225. The tax loss for the year 1930 is estimated at \$24,216. Expenditures for roads on restricted land, estimated for the same year, \$14,196. The estimate of law-enforcement expenditures among the Indians was \$4,258 97. The total tax loss and the estimated expenditures for Indians for 1930 were more than \$42,672. Against this, Federal aid had been received in the sum of approximately \$10,000.

County Engineer Settle, in testifying before the subcommittee, stated in answer to a question as to the consequence of the situation herein described as follows:

"The question of law enforcement, of schools, and roads is very acute now. I think our school situation is as bad as anything."

The witness also stated that it costs the local agencies about \$1 per day for the education of children. For this service they are paid 19 cents per day by the United States.

The committee will not encumber this report with detailed consideration of the differences in the per capita tuition payment made by the United States in the different counties of the country. The tuition rate seems to vary from 5 cents per capita per day in Lake County, Mont., on the Flathead Reservation, to 60 cents per day in Yakima County, Wash., and possibly to some other counties in addition. The cost of the service to the Indian children itself is a variable amount. The inquiry made does not disclose the exact amount of this cost, but it is reasonably safe to say it varies from a minimum of 60 to 65 cents per capita per day to a maximum of a little more than \$1 per day. These figures relate only to the grade schools. It is believed that the cost in the high schools, which are attended by Indian children in some parts of the country, would be approximately double the cost of the grade schools.

Referring further to Mayes County, it has already been mentioned that the evidence discloses that the only way the county is able to function is under a State aid law. By such aid, it is able to keep open its schools, but not for a full term of school in a year. Mr. Settle further states that the other parts of the State which are subject to taxation contribute by the State-aid system the money to maintain the schools in the districts in which the percentage of tax-exempt land is high. Every school district in Mayes County has voted its limit of 15 mills.

That means 15 mills ad valorem taxation.

The testimony further shows that Delaware County has more non-taxable land than Mayes County, and that other counties are similarly situated. The only encouraging factor is that certain portions of the restricted tax-exempt land are by slow process passing into nonrestricted ownership, or in other words are finding their place on the tax roll.

The problems of education, and in some areas, of poor relief, will still remain with the counties of the State of Oklahoma.

This report was made prior to any of the present relief set-up. This was back in 1930.

At page 12 of the same report, under the heading, "Obligation of the United States Already Recognized," it is stated:

Numerous precedents may be cited in behalf of the idea that the United States had already acknowledged its obligations to State, county, and local political subdivisions on account of the maintenance of areas of tax-exempt lands.

At page 13 of the same report, it is stated:

The act of March 3, 1921, authorized the State of Oklahoma to collect a gross production tax upon oil and gas produced in Osage County, Okla. Under this authority, there has been paid to the State of Oklahoma the sum of \$2,604,682.22, and there has also been paid to Osage County the sum of \$867,205.77.

For a further showing of the acknowledgement of the obligation of Congress to States wherein exempt Indian lands are situated, the report says:

The act of July 1, 1892 (27 Stat. 63, sec. 2), authorized the payment of "such part of the local taxation as may be properly applied to the lands allotted" to Indians of the Colville Reservation in Washington,

and following are numerous other instances of the same character.

The position of Oklahoma is unique in that the important oil fields were brought in on exempt Indian lands, and the oil and gas produced from such lands, while tax-free to Oklahoma, its counties, and school districts, has found its way into the taxable assets of other States in the form of gas filling stations, oil company office buildings, pipe lines, tank farms, refineries, and many other taxable evidences of property, and has thereby contributed a far greater amount in taxes upon assets in other States thus created, than Oklahoma is now asking by way of reimbursement. In addition, the State has been stripped, so to speak, of one of its principal natural resources to a substantial extent, many of the oil fields having been depleted and abandoned, without having contributed revenue to the State where located—the State which has furnished them protection.

Adverting to the former report of this committee above referred to, at page 21 is the heading, "Proposals for Relief," and on page 22, under that heading, is found the following language:

The committee recommends that the United States provide the relief by meeting its obligation to its own wards to the extent of providing in substantially full amount the money required for education, health, law enforcing, and indigent relief.

The foregoing suggestion of the committee would be adequate for the future, but would be wholly inadequate as a remedy for Oklahoma's present ills, that State having already suffered a financial loss of in excess of a hundred and a quarter million dollars, which amount is for expedient reasons advisedly placed far under the real loss sustained by the State. If interest at 4 percent on the obligation, and the cost to the State of the great volume of the important and long-enduring Indian lawsuits and title litigation were considered, the amount, conservatively estimated, would be doubled. In this connection, reference is made to the fact that the bonded indebtedness of the counties and local subdivisions, particularly school districts, has for the most part been forced upon the local governments by the lack of sufficient

taxable property to support them, which bonds have been refunded or renewed from term to term, and are now outstanding in the amount of \$170,000,000. It may not be amiss to call your committee's attention to the fact that from figures furnished from the records of the Commissioner of Internal Revenue, the income and internal taxes paid to the Federal Government from Oklahoma in 1906 to 1937, inclusive, is \$490,000,000. In the year 1937 taxpayers of the State of Oklahoma paid into the National Treasury the sum of \$50,875,455.43, while at the same time bravely and patiently bearing the burden of providing government, highways, schools, and police protection and all other of the manifold facilities of governmental protection accorded the Indian citizens of the State.

Not content with restricted land-tax exemption, oil- and gas-tax exemption from restricted lands, the lessees of such lands have enjoyed freedom from the Oklahoma State net income tax until a few days ago when the Supreme Court of the United States repudiated its holding of 15 years and reversed the case of *Gillespie v. Oklahoma*, which case denied to Oklahoma the power to levy and collect a net income tax upon the income of Frank Gillespie, a white, unrestricted oil producer, upon income arising from the sale of oil produced from an Indian oil and gas mining lease. In a case arising in Wyoming a few days ago, as above stated, the Supreme Court of the United States held that the *Gillespie case* is contrary to correct principle, and "should be, and is hereby, overruled," thereby vindicating the position which has been maintained by Oklahoma since statehood.

Incidentally, I wish to call your attention to the fact that inheritances of restricted Indian estates are likewise exempt from the State inheritance or estates tax.

The Congress of the United States has, by various acts, given congressional consent to the State to levy taxes on the production from restricted lands and acknowledged not only that such lands and the production therefrom are proper subjects of taxation within the State, but that they should be taxed by the State. If, accordingly, they are now proper subjects of State taxation, and should be taxed, they were always proper subject of taxation, and the State of Oklahoma should have been permitted to levy such taxes from the date it achieved statehood, or if, as an alternative, the Federal Government, in the exercise of its duty as guardian of the Indian as its ward to whom it owed protection, felt obligated to extend the privilege and immunity of tax exemption to the Indian and to the oil-producer lessee, the Government should pay the bill.

A few observations concerning appropriations made to Oklahoma which may be thought by some to be proper offsets to Oklahoma's claim, are given as follows:

First, the \$5,900,000 appropriation made at the time of statehood was merely to offset school lands already devoted to school purposes on the western side of the State, there being no Government lands from which school lands could be furnished on the east side of the State, and is therefore wholly disconnected and irrelevant to any Indian matter, but would have been made had the Indians been domiciled elsewhere.

Second, all institutional or departmental appropriations made by the Government for the construction, maintenance, and upkeep of Indian institutions, agencies, and Indian schools would have been

made by the Federal Government had the Indians been located outside of Oklahoma, and are, therefore, not to be considered here.

Third, Federal aid to the construction of highways in Oklahoma would have been granted just the same had there not been an Indian in the State, as such aid has been given to all other States in the Nation.

The payments as to Osage County referred to in the report of this committee herein first above mentioned, after the minerals became taxable under acts of Congress, amount to nothing more than a collection convenience which means that the tax, having been laid by Oklahoma on the oil and gas produced from the restricted lands, was more easily collected by full payment being made to the agency and by it returned to the State, so such payments are not payments at all by the Federal Government to Oklahoma in liquidation of any past or present obligation.

It is only such appropriations which may have been made and which, no doubt, will be furnished this committee by the Department, which have minimized and alleviated the tax burden of the State of Oklahoma, such as the per capita payments for Indian children attending the public schools that should be allowed as offsets to the amount otherwise due the State and its local subdivisions.

The United States can in good conscience make restitution to the State of Oklahoma either by a direct appropriation, the issuance of noninterest bearing notes, or by authorizing the Commissioner of Internal Revenue and the Secretary of the Treasury to return to Oklahoma each year from receipts of Federal income taxes from Oklahoma an amount sufficient to liquidate the obligation in an appropriate period of years.

The CHAIRMAN. Is it not a fact that shortly after statehood the legislature of Oklahoma enacted legislation on the basis of those lands being taxable, that the legislation proceeded to provide machinery for levying the land tax, and that later the Supreme Court held that such legislation was unconstitutional?

Mr. KING. The State supreme court, on which sat present Circuit Judge R. L. Williams, as chief justice, later Governor of the State, who was a member of the constitutional convention; Samuel W. Hays, a member of the constitutional convention; and Matthew J. Kane, likewise a member, held the lands and the oil and gas taxable. That case was reversed by the Supreme Court of the United States, and all efforts to enforce legislation by the State to tax either the Indian lands, the Indians' oil and gas from Indian lands—that is, his royalty of one-eighth—or the seven-eighths working interest belonging to the oil operators were denied by the Federal Government as being in violation of allotment statutes of the United States and on the further general ground that they inherently impinged the agencies or instrumentalities of the Federal Government in that the Federal Government could not successfully administer the fortunes of the Indian if he was to be subjected to State taxation.

Does that answer your question?

The CHAIRMAN. Yes; in part.

If it is agreeable to the proponents of this resolution, I would suggest that this record could be made a little more complete if you would attach to or make a part of the record at this point a copy of the legislation that authorized the assessment of taxation on those lands—the general legislation under which they were taxed—then



submit a copy of the decision of the State supreme court wherein the lands were held to be taxable, and then, still later, a copy of the decision of the Supreme Court of the United States, wherein the State law was held to be invalid.

Mr. KING. We will be glad to do that.

The CHAIRMAN. If you will get that together and submit it to the committee, it will be placed in the record.

(References to statutes and court decisions above referred to follows:)

Immediately after statehood (November 16, 1907) the legislature was convened and enacted a number of revenue measures among which were the following:

Chapter 71, Article 1, Session Laws 1907-8, being a general revenue measure, entitled: "An act providing for the assessment for taxation for State, country, city, town, township, and school purposes \* \* \*."

Section 11 of the above-entitled act applied to the taxation of oil and gas wells and all property used for the purpose of producing, pumping, distributing, or storing crude oil or natural gas. Section 12 of the act applied to tank farms, storage tanks, pipe lines, and fixtures.

Article 2 of said chapter 71 is a gross revenue act. Section 6 thereof levies a tax, in addition to the taxes levied on an ad valorem basis, equal to 2 per cent of the gross receipts from the total production of coal and one-half of 1 per cent of the gross receipts from ores bearing lead, zinc, jack, gold, silver, or copper, or of asphalt; and a like tax of one-half of 1 per cent of the gross receipts from the total production of petroleum or other mineral oil or of natural gas.

Article 7, chapter 81, provided for a graduated tax on land holdings, and a graduated tax on the incomes, rents, and profits of lands held by lease or rental contract in excess of 600 acres.

Article 10, chapter 81, Session Laws 1907-8, provided for the levy and collection of a tax on income and declared an emergency.

Article 11, chapter 81, provided for a tax on gifts, inheritances, bequests, and legacies.

During the following session of the legislature which convened in 1909, a little more than a year after the statehood proclamation, enacted article 1, chapter XXXVIII, being a general revenue bill providing for raising and collecting revenue for the fiscal year 1910 and each year thereafter. As shown by section 13 and subsequent sections of the act, the tax specifically applied to oil wells, storage tanks and equipment, pipe lines and pump stations.

Article 2 of the laws of 1909 is a general revenue act applying to gross receipts from persons, firms, corporations, or associations engaged in the mining or production of coal, asphalt or ores bearing lead, zinc, jack, gold, silver or copper, or of petroleum or other mineral oil or of natural gas.

The legislature of 1910 enacted a number of laws applicable to oil and gas one of which is a gross revenue-tax act, chapter 44, Session Laws of 1910, applying to the gross revenue of oil, gas, and other minerals.

At the 1916 session of the legislature, the original gross production tax act applying to oil, gas, and other minerals was enacted and is found at chapter 39, Session Laws of 1916, and levies a tax of 3 per cent on the gross production of oil, gas, and other minerals. This act was in force and effect with some slight amendments until the increase of the rate from 3 to 5 per cent by recent legislature.

Efforts were made by the taxing authorities of the State to apply each and every one of the foregoing tax measures, except the graduated land tax, to oil and gas and other minerals produced from Indian land, and to collect the general ad valorem tax from restricted Indian lands and the State authorities were in each instance denied the right to collect such taxes as shown by a long line of State and Federal court decisions, a brief résumé of which is as follows:

*Choctaw & Gulf R. R. v. Harrison* (1914) (235 U. S. 292), held that, where by agreement with an Indian tribe the United States assumed a duty in regard to operation of coal mines, the lessees of the mines were instrumentalities of the Government and could not be subjected to a State occupation or privilege tax.

*Indian Oil Co. v. Oklahoma* (1916), 240 U. S. 522, held that oil leases in Oklahoma made by the Osage Tribe were under the protection of the Federal Government; that the corporation owning the leases was a Federal instrumentality and that therefore the State could not tax its interest in the leases, either directly or by taxing the capital stock of the corporation owning them.

*Jaybird Mining Co. v. Weir* (1926), 271 U. S. 609, held that where mining land was leased by incompetent Indian owners with the approval of the Secretary of the Interior, in consideration of royalty in kind, a State ad valorem tax assessed to lessee on ores in bins on the land, before sale or segregation, was void as an attempt to tax an agency of the Federal Government.

*Howard v. Gypsy Oil Co.* 247 U. S. 503, and *Large Oil Co. v. Howard*, 248 U. S. 549, were cases wherein the Supreme Court of the United States granted injunctions against the State authorities attempting to enforce the State gross production tax laws against the oil company lessees of restricted Indian lands.

*Choate v. Trapp* was a case involving lands of allottees of the Five Civilized Tribes. The Supreme court of the State (28 Oklahoma 517) held the subject matter taxable. The cases was appealed to and reversed by the Supreme Court of the United States, 224 U. S. 665, that Court holding the lands nontaxable.

The case of *Gillespie v. Oklahoma* was a case wherein the State supreme court sustained the State income tax as applied to the net income of Frank Gillespie, an individual oil operator, under a restrictive Indian lease. The *Gillespie* case was reversed by the Supreme Court of the United States on appeal, that Court holding the net income derived from the sale of oil and gas was nontaxable; that such a tax would constitute an unlawful burden upon a Federal instrumentality and thereby cripple the arm of the Government in administering the fortune of the Indian. See 81 Oklahoma 803; 257 U. S. 501.

It may be interesting to note that on the 7th day of March 1938, the Supreme Court of the United States reversed the *Gillespie* case, *supra*, in the case of *Helvering, Comr. of Int. Rev. v. Mountain Producers Corporation*, No. 600, October 1937 term, not yet officially reported. The reversal of the *Gillespie* case overturns a long line of cases and vindicates the authorities of the State of Oklahoma and restores the rule announced by the Supreme Court of Oklahoma a decade and a half before.

The foregoing references to the statutes and an examination of the foregoing authorities will be sufficient to show that the State of Oklahoma has made an earnest effort to collect taxes from restricted Indian properties and that such efforts have uniformly been denied the State through the official agencies of the Federal Government.

Senator HATCH. Before Judge King leaves, I should like to make this observation: While he has been testifying, I have been reminded that this problem which he presents is not alone confined to Indian lands. Many States have similar problems which have arisen in recent years because of the acquisition of large tracts of land, hundreds of thousands of acres of land, within the States, land taken from the tax rolls without any provision to compensate the States therefor.

I do not think your resolution is broad enough to include an investigation of the entire general problem. I am wondering whether it was your thought, Mr. Chairman, and the thought of these gentlemen who are sponsoring this resolution, to confine it strictly to the problem of Indian lands or whether you and they would be willing to broaden the scope of the inquiry.

The CHAIRMAN. That matter might be considered at an appropriate time, say in executive session, and if there should be any desire to broaden the resolution to have it cover additional phases of probable or actual loss of taxes for any purpose, that they be included in the investigation.

Mr. KING. If I may be permitted to say so to the Senator from New Mexico, Oklahoma would welcome such scope of inquiry as to other States which each individual circumstance may justify.

The CHAIRMAN. Does that conclude your statement at this time, Judge King?

Mr. KING. Before I finish, I want to say that this present movement was initiated by the State Legislature of Oklahoma in the passage of



Senate Resolution No. 8 and House Resolution No. 19, each resolution being entitled—

A resolution respecting reimbursement of the State of Oklahoma for loss of taxes on account of the exemption from taxation of Indian lands and oil and gas from Indian lands since statehood; recommending necessary proceedings to present Oklahoma's claim therefor.

After reciting the facts which I have just stated to the committee, the resolution, in part, says:

*Now, therefore, be it resolved by the Senate of the State of Oklahoma:* That the Congress of the United States be requested to take the necessary steps to ascertain the amount of loss or detriment suffered by the State of Oklahoma, through a proper fact-finding committee or tribunal and to make an adequate appropriation to reimburse the State of Oklahoma for such loss.

The CHAIRMAN. Will you place in the record a copy of one or both of those resolutions?

Mr. KING. I will. I will now offer for the record Senate Resolution No. 8 of the Senate of the State of Oklahoma.

(Senate Resolution No. 8 of the Senate of the State of Oklahoma is as follows:)

[Senate Resolution No. 8—By Senate Committee on Revenue and Taxation]

A RESOLUTION Respecting reimbursement of the State of Oklahoma for loss of taxes on account of the exemption from taxation of Indian lands and oil and gas from Indian lands since statehood; recommending necessary proceedings to present Oklahoma's claim therefor

*Be it resolved by the Senate of the State of Oklahoma,* Whereas the State of Oklahoma has, since Statehood, been deprived of the right of taxation of Indian lands and oil and gas from restricted Indian lands, amounting to a large sum, which had to be provided by increased taxes on the remainder of the property belonging to the other citizens of the State, and,

Whereas the State and its citizens have sustained the loss of a large amount of revenue on account of such exemption and as a result thereof, have been compelled to bear the burden of the principal cost of government, education, highways and police protection enjoyed by the Indian population, wholly from taxes raised from the property of the taxable citizens of the State, and,

Whereas the Indians, enjoying such immunity from taxation, are wards of the United States and not wards of the State of Oklahoma, and the cost of the exemption, immunities, and privileges granted to them should be borne by all the States and not alone by Oklahoma.

Whereas Congressman R. P. Hill of the Fifth District of Oklahoma, in a communication to the President of the Senate, has indicated his purpose and intention to co-operate with the State of Oklahoma in affecting a settlement of the claim by obtaining an adequate appropriation and has signified his desire that the State of Oklahoma furnish the services of a lawyer thoroughly familiar with taxation matters and the Indian laws in order to properly represent the State before the necessary committees in Congress and the necessary tribunals in which to establish the amount of detriment or loss sustained by the State of Oklahoma;

*Now, therefore, be it resolved by the Senate of the State of Oklahoma:* That the Congress of the United States be requested to take the necessary steps to ascertain the amount of loss or detriment suffered by the State of Oklahoma, through a proper fact-finding committee or tribunal and to make an adequate appropriation to reimburse the State of Oklahoma for such loss; and,

*Be it further resolved,* That the Governor and the Oklahoma Tax Commission are hereby authorized and requested to take the necessary steps by employing a competent attorney familiar with Indian affairs and taxation to represent the State of Oklahoma before the committees of Congress and such other tribunals as may be necessary in which to establish and to prosecute to final conclusion the claim of the State of Oklahoma on such basis of contract as shall be just and reasonable and to provide for adequate compensations and expenses, not to exceed however the adjournment date of the next regular session of Congress without the further approval of the Legislature.

*Be it further resolved,* That 500 copies of this Resolution be printed for the use of the Governor and the Oklahoma Tax Commission.

Adopted by the Senate the 4th day of January 1937.

Mr. KING. The House resolution is identical.

The State of Texas by its Senate Concurrent Resolution No. 51, by Oneal, passed by both houses of the Legislature of the State of Texas on March 30, 1937, adopted the following resolution.

[Reading:]

STATE OF TEXAS, SENATE CONCURRENT RESOLUTION NO. 51, BY ONEAL

Whereas the Legislature of the State of Oklahoma has exhibited to the Legislature of the State of Texas a brief showing that, since statehood, Oklahoma has been deprived of the right of taxation of Indian lands and oil and gas from restricted Indian lands, amounting to a large sum, which had to be provided by increased taxes on the remainder of the property belonging to other citizens of that State; and that the State of Oklahoma and its other citizens have sustained the loss of a large amount of revenue on account of such exemption and as a result thereof have been compelled to bear the burden of the principal cost of government, education, highways, and police protection enjoyed by the Indian population, wholly from taxes raised from the property of the taxable citizens of the State; and that the Indians enjoying such immunity from taxation are wards of the United States and not wards of the State of Oklahoma; and

Whereas it appears from this showing that the citizens of the State of Oklahoma should be reimbursed by the United States and should not be required alone to bear this added burden; now, therefore, be it

*Resolved by the Senate of the State of Texas (the House of Representatives concurring), That the Congress of the United States be requested to take the necessary steps to ascertain the amount of loss or detriment suffered by the State of Oklahoma and the people of Oklahoma, through a proper fact-finding committee or tribunal and to make an adequate appropriation to reimburse the State of Oklahoma, and be it further*

*Resolved, That the secretary of state of the State of Texas be requested and instructed to send a duly authenticated copy of this resolution to the Honorable Sam Rayburn, Congressman from the State of Texas, and to the Honorable John N. Garner, Vice President of the United States, and to the Honorable Allen C. Nichols, president pro tempore of the Senate of the State of Oklahoma, and to Honorable J. T. Daniel, speaker of the House of Representatives of the State of Oklahoma.*

WALTER F. WOODUL,  
*President of the Senate.*

I hereby certify that Senate Concurrent Resolution No. 51 was adopted by the Senate March 30, 1937.

BOB BANKER,  
*Secretary of the Senate.*

R. W. CALBERT,  
*Speaker of the House of Representatives*

I hereby certify that Senate Concurrent Resolution No. 51 was adopted by the House of Representatives March 31, 1937.

LOUISE SNOW PHIMEY,  
*Chief Clerk of the House of Representatives.*

I wish to call the committee's attention to a communication received since I came up here. I shall read it:

STATE CAPITOL, STATE OF OKLAHOMA.

*To the Committee on Indian Affairs of the Senate and of the House of Representatives of the United States:*

It having been conclusively shown to the Governor and to the other elected executive officers of the State of Oklahoma whose names and titles are subscribed hereto that due to the enforced exemption and immunity from taxation since statehood of Indian lands in the State of Oklahoma, comprising the 44 eastern counties of the State of Oklahoma and a number of the counties in the western side of the State, and a like immunity from taxation of oil and gas produced from Indian lands, including the exemption of the oil companies' seven-eighths working interest, as well as the Indians' one-eighth royalty, the State of Oklahoma has sustained a loss of in excess of \$100,000,000, and more than half the counties

and school districts of the State have, in order to maintain local government, been forced to issue bonds against the taxable property within such counties and districts, which bonds have, for the most part, been renewed, from time to time, by refunding issues, and are still unpaid, we respectfully represent to your honorable committees and to the Congress that an appropriation should be made to the State of Oklahoma to reimburse the State for its loss sustained.

Due to the exemption of Indian lands and oil and gas from Indian lands in the State of Oklahoma, the taxable property within the State has been forced to provide courthouses, highways, schoolhouses, and all of the facilities of government and police protection, including the use of its courts and schools for the Indian population and the Indian children at the exclusive expense of such taxpayers within Oklahoma, and since the Indian is a ward of the Federal Government the expense of the privileges and immunities afforded him by the Federal Government as its ward should be borne by all the States and not by a portion of the population of one State.

That is signed by E. W. Mariand, Governor of Oklahoma, and by the chief justice of the supreme court, the secretary of state, the attorney general, the State auditor, the State examiner and inspector, the commissioner of charities and corrections, the president of the board of agriculture, and the chairman of the corporation commission.

It is dated the 27th day of April 1938.

I have read this to the committee for the purpose of showing that the State is seriously concerned.

In verification of my statement that neither the Enabling Act nor the accepting section of the State constitution mentions the matter of Indian tax exemption, I call the committee's attention to the act of 1934, Statutes at Large, page 268, which is the section of the Enabling Act authorizing Oklahoma Territory and Indian Territory to become a State. That section provides that the inhabitants of Oklahoma Territory and Indian Territory:

May adopt a constitution and become the State of Oklahoma provided that nothing contained in said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories, so long as such rights shall remain unextinguished, or limit or affect the authority of the Government of the United States to make any laws or regulations respecting such Indians, their lands, property or other rights, by treaties, agreements, law, or otherwise which it would have been competent to make if this act had never been passed.

The accepting clause of the State constitution, adopting the terms of the Enabling Act, is section 28, article 24, of the constitution of Oklahoma, and is as follows:

The terms and provisions of an act of Congress, to enable the people of Oklahoma and Indian Territory to form a constitution and be admitted into the Union on an equal footing with Original States are hereby accepted.

When the treaty of purchase of the Louisiana Territory was negotiated with France, it was required by the French Government that the United States guarantee to the subjects of France all of the rights, privileges, and immunities of citizens of the United States and that as the Territory became sufficiently populous to be eligible for statehood the new States created from the Louisiana Territory be admitted to statehood on an equal basis with the States of the United States.

The language as to the citizens or subjects is as follows, and I quote from article III of the treaty with France, found in Eighth United States Statutes at Large, page 202:

The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States: \* \* \*

Senator HATCH. There is a question I want to ask you, but I do not want you to think that it indicates any thought of my own that those items would constitute a proper offset. I am anticipating that perhaps some argument will be advanced by others with respect to that. You stated, for instance, that in 1931 Oklahoma had paid into the Treasury of the United States some \$50,000,000.

Mr. KING. Yes.

Senator HATCH. Have you made any estimate of or do you know what payments have been made by the Federal Government within the State of Oklahoma for relief, soil conservation, and such other purposes?

Mr. KING. Our position on that, Senator, would be this: Answering the first part of your question, I have not the figures on those bulk appropriations; no. The position of Oklahoma on that, however, is that those grants for the general welfare of the State and Nation, growing out of the needs for relief or conservation in any form would have been made, in as substantial amounts as they have been made to the State of Oklahoma had there been no Indian population. That would be a matter of comparative figures, and we shall be very glad to provide the Senators with that information as far as it may be ascertained.

It is a little difficult, I think, to differentiate between the amount that would have been furnished the State and the increased amount that may have been furnished the State by virtue of the impoverished condition due to the Indian land tax exemption.

Senator HATCH. I see that point of view.

Another thought as to your Indian population: How are those Indians, considered from the standpoint of their being impoverished?

Mr. KING. Taking them as a whole, they rank equally with other people, except the Osages, who are the best-situated people in the entire United States. They are the most affluent.

But as to the general rank and file of the Indian population, on account of all of their allotments—many of them still have them—as a general rule they would rank, I think, quite along with the general run of citizens of the State.

Senator HATCH. Has the Federal Government made any special grants to the Indian population?

Mr. KING. There have been a number of grants. That information we expect to have furnished by the Department of the Interior through the Bureau of Indian Affairs, and it will show what offsets should be allowed if the committee favorably entertains an adjustment. We have not compiled the possible offsets which Government may assert. I mentioned some that I did not think would be proper offsets, but Oklahoma concedes and will not contest the offset of any amount which directly or indirectly may have in any manner minimized the tax burden of the State of Oklahoma as to the exempt property or the Indian himself.

Mr. CRANE. If it had not been for this tax-exempt land, the relief needs of the State of Oklahoma would have been somewhat greater, because a number of the Indians would have lost their land before this time and would have had to have relief help.

The CHAIRMAN. May I ask this question: Are you proceeding on the assumption that this resolution, if enacted, will afford the State an opportunity to present a legal claim or a claim based upon a moral right and an equitable right?

Mr. KING. Only a moral obligation, Mr. Chairman. The State of Oklahoma might possibly maintain a legal right in behalf of its citizens against the Federal Government after obtaining the consent of Congress to either present its claim to the Court of Claims or to sue in equity; but since the Supreme Court of the United States has held the lands to be exempt from taxation and the oil and gas therefrom to be exempt from taxation, we would be compelled to ask the court to give a judgment against the National Government and after that we would still ultimately have to get relief from Congress by way of appropriation to pay the judgment.

The CHAIRMAN. As I understand it, your answer is that this is a moral and an equitable claim rather than a strictly legal claim?

Mr. KING. It is wholly so, and we are, therefore, appealing solely to the Congress to grant the relief by direct legislation, as a matter of grace and justice.

The CHAIRMAN. Is it not a fact that there are numerous cases of record in which the Indians or the Indian tribes have presented claims to the Government, and in which the Supreme Court has held that the claims were not legal or based upon legal grounds or legal rights but that the Congress might in its wisdom proceed to consider the claims on the basis of justice or equity?

Mr. KING. There are many such instances or precedents.

There is a case in point in the Enabling Act, now before you for consideration. At the date of statehood—Congress voluntarily, without any legal authority other than its inherent right, appropriated to the State of Oklahoma \$5,000,000 as a pure donation, out of a sense of obligation or right, to offset the lack of Government lands in the eastern part of the State. That \$5,000,000 donation was directed by the Congress to go into the school fund of the State.

The Congress, Mr. Chairman, not only has a plenary right to make such an appropriation, but it may, incidentally, direct the manner in which the State must use the money so appropriated. The right to appropriate carries with it the right to direct how it shall be used. It may safeguard the fund against misapplication or improper use.

The CHAIRMAN. At this point let me state for the record very briefly an incident that might have some bearing upon this case.

When the Government made a treaty with the Kiowa-Comanche Apache Indians in southwestern Oklahoma, it was thought that the boundary line between Oklahoma and Texas was the middle or center of the Red River. So, when the treaty was made placing those Indians in that territory, the treaty provided that the southern boundary of the reservation was the middle of the Red River. At that time it was obvious to all parties that the middle of the Red River was the boundary line between Oklahoma and Texas. At a later date, when oil was discovered along the bank of the Red River in Texas, it was further discovered that the oil extended out into the river bed.

The oil companies proceeded on the theory that the south half of the river was in Texas and began to drill wells in the south half of the river bed.

That brought on litigation. The State of Oklahoma contended that the true boundary was not the center of the river but was the south bank of the Red River.



The case went to the Supreme Court, and the Supreme Court sustained Oklahoma's contention and, in effect, settled definitely the fact that the southern boundary of Oklahoma is the south bank of the Red River. By that decision the territory between the middle of the river and the south bank was placed in Oklahoma.

When that was done, the State of Oklahoma laid claim to the oil lands in the south half of the river, and the Indians laid claim to the royalties or benefits of oil from the south half of the Red River.

The Supreme Court held that the court was bound by the treaty and that in law the Indians had no right to the property between the middle of the river and the south bank. Thus the Indians were denied any legal right to those lands or the benefits from those lands.

As a Member of the House of Representatives, I introduced a bill proposing to give the Indians the royalties from the oil derived or produced from the south half of the Red River. That was done not upon a legal basis but upon an equitable basis. The Congress after, I think, 4 years of consideration, finally enacted the legislation and gave the Indians—the Kiowa-Comanche-Apache Indians—the benefits or the value of the oil produced in that territory. As a result of that legislation, those Indian tribes have received approximately \$2,000,000 in royalties.

The Congress overlooked the legal right and gave to those Indians the benefits on this assumption, and it is an obvious one: that had the authorities known that when the treaty was made with the Indians, they would not have written the treaty placing the south boundary of the Indian reservation at the middle of the river but would have, obviously, made the south bank the boundary line between Oklahoma and Texas.

In other words, had the law been settled, and had the authorities and the Indians known of it, their treaty would have recited that the southern boundary of their reservation went to the Texas line, which was established as the south bank of the Red River. Because of that development Congress, in the adjustment of the matter with those Indians on the basis of equity and right, corrected that treaty boundary. While the treaty itself was not corrected, of course, the implications or the effects were corrected, and the Indians were then and are now given the full royalties derived from the production of oil in the south half of the Red River, and any other values that may come from future discoveries will no doubt be conceded to be the property of those Indians.

That is a concrete case in which Congress in the past corrected legal language and gave to the Indians the benefit of what obviously would have been theirs had all the facts been known when the original treaty was written.

Mr. KING. Mr. Chairman, I had not expected the hearing to consume as much time as I have already taken.

Former United States Senator Robert L. Owen is here to address this committee and should have an opportunity to address you at length, because he has a wealth of knowledge and information concerning this subject matter that I do not possess.

There are perhaps 30 minutes left in which to introduce evidence. Whether the committee wants that evidence introduced now or would rather wait until a later hour to hear Senator Owen make his argument is a matter for the pleasure of the committee, and I suggest your consideration of it at this time.

The CHAIRMAN. You may proceed.

Mr. KING. I should like to ask former Senator Owen to take the floor at this time.

**STATEMENT OF HON. ROBERT L. OWEN, FORMER UNITED STATES SENATOR FROM OKLAHOMA**

The CHAIRMAN. For the record, will you make a preliminary statement which will properly identify your testimony?

Mr. OWEN. My name is Robert L. Owen. I am a long-time resident of Oklahoma, having lived there since 1879.

I was United States Indian agent for the Five Civilized Tribes from 1885 to 1889; I was Democratic national committeeman from 1892 to 1896; and I was United States Senator from 1907 to 1925, inclusive.

Senate Resolution 168, which I have had read to me, as I understand it, contemplates an inquiry by this committee looking to the doing of equity not only to Oklahoma but to some dozen or more States besides which are similarly situated, having within their borders tax-exempt Indian lands. My observations will be confined to the State of Oklahoma as one of those States which would be covered by the resolution in question.

I take it that this committee will first find it necessary to ascertain what principles of law and justice would apply to such cases relating not only to Oklahoma but to the other States, and if the resolution should be extended as proposed by one of the Senators present, it might include also the principles governing the untaxed lands of the United States within the States themselves.

The State of Oklahoma presents an extraordinary situation for the reason that within that State were collected tribes of Indians from all of the surrounding States. The Delawares came originally from Pennsylvania, the Shawnees from Ohio, and so forth. I shall not enumerate in detail the movements of those Indian tribes from other States; I mention this only to show the justice of the claim of the State of Oklahoma, because the other States would have had the same problem on their hands except for the transfer to Oklahoma of those tribes with the tax-exempt lands. Therefore, Oklahoma should have the sympathy, I think, of other States which have been relieved of this burden, for the entire burden has been placed upon the State of Oklahoma, insofar as the Indians who were transferred to Oklahoma are concerned.

I think it is proper, in connection with this matter, because this is an appeal to the conscience of the Congress of the United States. This is not a legal proceeding before a court of law. Neither is it a proceeding in equity before the judicial department of the Government. This is an amicable proceeding appealing to the good-will and the good understanding of the Representatives of the 48 States in Congress assembled as to what is right and what is the substance of the right in such a case as this.

Let us consider where the Five Civilized Tribes came from. Take, for instance, the Cherokees. Royce in his History of the Cherokees, published by the Smithsonian Institute, calls attention to the fact that 81,000,000 acres of land were ceded by the Cherokees in the East, an acreage at least twice as great as that of Oklahoma, which has approxi-



mately 42,000,000 acres. Those lands which were acquired from the Cherokees by the United States were transferred to Georgia, to Alabama, to Tennessee, and to North Carolina; and Kentucky also received a substantial part of those lands relinquished by the Cherokees.

So it was that Florida, formerly occupied by the Seminoles, was relieved of the Seminoles. In like manner Alabama, Mississippi, and Louisiana were relieved of the Creeks, Choctaws, and Chickasaws.

All of those States have been relieved of the problem which is now imposed upon the State of Oklahoma.

The United States, in transferring these Indian people from the East to the West, did so under an act of Congress of 1830, although some of them had previously agreed to be transferred by negotiations, such as the Choctaws in 1820 and the Western Cherokees in 1817 and 1828. The United States in transferring the Indian people from east of the Mississippi River, for the benefit of States east of the Mississippi River, entered into an agreement with these five tribes by which the Five Civilized Tribes acquired the fee simple title to the entire Territory of Oklahoma, now the State of Oklahoma, with a stipulation by the United States, acting through the Congress of the United States, that no State or Territory should ever be erected over the lands of the Five Civilized Tribes.

That was a precious grant to the Indian because he held his land by communal Indian title, in which no Indian could alienate any part of the public domain; therefore, the treaties were framed so that the liberty and freedom of the Indian people, who loved to travel freely over the country they occupied, should never be interrupted or destroyed.

Then the Civil War took place. The United States at the close of that war determined upon a policy by which ultimately States of the Union should be organized out of those lands, and the agreements reconciling the differences which arose from the Civil War contemplated a future allotment of land and the establishment of a State. That policy was of vast importance to the United States; it was very distasteful to the Indian. The United States had at stake the development of 44,000,000 acres of land rich in agricultural resources, known even at that early date to have oil exposures in various parts of the Indian Territory, and oil springs in the Chicasaw country, such as the exposures near Ardmore, those at Claremore, and the oil springs north of Tahlequah. Those resources were known to exist.

The United States desired to extend and develop the natural resources of the Indian Territory so that the people of the United States might have the benefit of the great natural resources which were within that area, and incidentally so that when those resources were developed by the activities of the inhabitants, that Territory might be erected into a State, and the United States might derive therefrom the large revenues which would ensue. Without that development the revenues from the Indian Territory received by the Treasury of the United States were practically nothing. Last year, 1937, they were \$50,000,000 plus; for 1938 they will be \$50,000,000 plus. The United States has received, as Judge King very properly pointed out, \$490,000,000 in revenue from those lands since the establishment of statehood and the development of those resources was begun. Z

A memorandum to that effect was sent to the chairman of this committee within the last few days, at my suggestion. I think that that record of the revenues arising from those lands should be placed in the record as a part of this story, and I ask that that be done. I have in my possession a copy of that statement. May I offer it for the record?

The CHAIRMAN. Without objection, the statement referred to will be placed in the record at this point.

(The document referred to is as follows:)

*Total Federal taxes collected in Oklahoma, 1906-37*

PART OF THE INTERNAL-REVENUE COLLECTION, DISTRICT OF KANSAS

Fiscal year	Indian Territory	Territory of Oklahoma	Oklahoma
1906.....	\$12,223.06	\$78,964.91	\$91,207.97
1907.....	15,891.95	103,567.60	119,459.55

TERRITORIES BECOME THE STATE, NOV. 16, 1907

1908.....			\$100,513.90
1909.....			58,692.29
1910.....			111,010.29
1911.....			133,336.94

OKLAHOMA DETACHED FROM KANSAS DISTRICT AND CONSTITUTED A SEPARATE COLLECTION DISTRICT, FEB. 6, 1911

1912.....			\$148,906.34
1913.....			177,649.30
1914.....			361,150.98
1915.....			739,323.56
1916.....			1,267,289.06
1917.....			6,880,882.64
1918.....			19,534,935.46
1919.....			17,661,704.61
1920.....			26,290,802.34
1921.....			27,599,643.12
1922.....			18,402,452.57
1923.....			13,079,186.66
1924.....			13,320,563.14
1925.....			11,621,795.16
1926.....			18,053,775.04
1927.....			23,919,138.67
1928.....			20,514,867.53
1929.....			17,940,513.26
1930.....			18,079,569.43
1931.....			16,922,127.45
1932.....			10,165,348.04
1933.....			24,781,167.54
1934.....			44,797,191.11
1935.....			43,377,493.63
1936.....			44,990,568.21
1937.....			56,875,455.40

Mr. OWEN. The question is, Shall the people of Oklahoma, who have borne this burden, as was so well described by Judge King; who have been compelled during all these years to improve the Indian lands by building roads at the expense of the other people of the community and for the benefit of the United States—shall the people of Oklahoma receive no reimbursement for those taxes of which they have thus been deprived?

While it is a large amount, the amount of the benefits which have been received by the people of the United States is infinitely larger. As a matter of equity, I cannot discern any defense whatever in a denial of the prayer of the State of Oklahoma.

Recently in the study of the Cherokee outlet, a matter now before the Court of Claims, in which I am attorney of record, I had occasion to review this history and particularly the treaty with France, to which Judge King referred. I think there should be placed in the record the third article of that treaty, in which Napoleon Bonaparte wrote an express provision that the inhabitants of the Louisiana Purchase should in due season be admitted to the Union of the States on terms of equality with all the other States.

That obligation was entered into by the United States in acquiring this vast territory west of the Mississippi River, worth untold billions to the people of the United States. That was one of the conditions upon which the United States acquired that title. It is not only a moral obligation, but it is a legal obligation, never pleaded before any court, as far as I know.

Above and beyond that obligation of the United States, however, entered into in the matter provided by law, there are the fundamental principles of the Constitution of the United States itself. Article IV, section 6, authorizes the admission of new States into the Union. The Union of the Colonies into the United States contemplated the admission of other States as rapidly as they were inhabited and were able to sustain statehood. That took place, one by one, until finally the 48 States became a Union—an indestructible Union of indestructible States.

If a State has not the free right of taxation within its borders, if the Federal Government can deny to the State the right to tax properties within its own borders, the power of the Federal Government to refuse this right would be the power to destroy the validity of the economic power and political force of each and every State to which such a rule were applied. But it cannot be applied. It would be a violation of the fundamental understanding of the Constitution of the United States by the people of the United States. There are rights in the people which it is not competent for even the Congress of the United States to impair. There are certain inalienable rights recognized by the Constitution itself in the tenth amendment.

When the people of the United States acquired the Louisiana Purchase under those terms and paid for it with \$27,000,000, that land became the property of the people of the United States. The tenth amendment to the Constitution applies to all of that territory. So that the picture may be complete, I shall read the tenth amendment to the Constitution:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

When the people of Oklahoma, under the enabling act passed by the Fifty-ninth Congress in 1906, organized a constitutional convention and adopted a constitution in pursuance of the authority given by Congress, they were exercising the powers vested in themselves by the Constitution of the United States, and there has been reserved to the Congress of the United States no power, in admitting new States to the Union, to deprive the inhabitants of those States of equality of rights with the inhabitants of other States.

Neither is there in the Constitution any authority to deny to a new State admitted in this manner equality of right in the matter of taxation, a vital attribute of sovereignty, and no such inhibition could

have been placed upon the inhabitants of Oklahoma who organized themselves into a State under the enabling act.

I made this morning a memorandum of the essential parts of the enabling act, and I should like to introduce that into the record at this time, if you please, Mr. Chairman.

The CHAIRMAN. Without objection, it will be made a part of the record.

(The document referred to is as follows:)

THE STATE OF OKLAHOMA ENABLING ACT

(34 Stat. 267, June 16, 1906)

*Be it enacted, etc.*, That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: *Provided*, That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed.

SEC. 3. \* \* \*

Third. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.

SEC. 7. That upon the admission of the State into the Union sections numbered sixteen and thirty-six, in every township in Oklahoma Territory, and all indemnity lands heretofore selected in lieu thereof, are hereby granted to the State for the use and benefit of the common schools: *Provided*, That sections sixteen and thirty-six embraced in permanent reservations for national purposes shall not at any time be subject to the grant nor the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character, nor shall land owned by Indian tribes or individual members of any tribe be subjected to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain: *Provided*, That there is sufficient untaken public land within said State to cover this grant: *And provided*, That in case any of the lands herein granted to the State of Oklahoma have heretofore been confirmed to the Territory of Oklahoma for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act.

There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of five million dollars for the use and benefit of the common schools of said State in lieu of sections sixteen and thirty-six, and other lands of the Indian Territory.

SEC. 8. That section thirteen in the Cherokee Outlet, the Tonkawa Indian Reservation, and the Pawnee Indian Reservation, reserved by the President of the United States by proclamation issued August nineteenth, eighteen hundred and ninety-three, opening to settlement the said lands, and by any act or acts of Congress since said date, and section thirteen in all other lands which have been or may be opened to settlement in the Territory of Oklahoma, and all lands heretofore selected in lieu thereof, is hereby reserved and granted to said State for the use and benefit of the University of Oklahoma and the University Preparatory School, one-third; of the normal schools now established or hereafter to be established, one-third; and of the Agricultural and Mechanical College and the Colored Agricultural Normal University, one-third. The said lands or the proceeds thereof as above apportioned shall be divided between the institutions as the legislature of said State may prescribe: \* \* \*

SEC. 12. That in lieu of the grant of land for purposes of internal improvement made to new States by the eighth section of the act of September fourth, eighteen hundred and forty-one, which section is hereby repealed as to said State, and in lieu of any claim or demand of the State of Oklahoma under the act of September twenty-eighth, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, making a grant of swamp and overflowed lands, which grant it is hereby declared is not extended to said State of Oklahoma, the following grant of land is hereby made to said State from public lands of the United States within said State, for the purposes indicated, namely: For the benefit of the Oklahoma University, two hundred and fifty thousand acres; for the benefit of the University Preparatory School, one hundred and fifty thousand acres; for the benefit of the Agricultural and Mechanical College, two hundred and fifty thousand acres; for the benefit of the Colored Agricultural and Normal University, one hundred thousand acres; for the benefit of normal schools, now established or hereafter to be established, three hundred thousand acres. \* \* \*

SEC. 22. That the constitutional convention provided for herein shall, by ordinance irrevocable, accept the terms and conditions of this act. \* \* \*

Approved, June 16, 1906.

Mr. OWEN. The United States, it is true, entered into agreements through the Dawes Commission with the Five Civilized Tribes, agreeing as part payment for the relinquishment of the promise made to those tribes that no State or Territory should ever be erected over them. Without that tax provision the Five Civilized Tribes would not have agreed to the allotment of their lands, in all human probability. They were in earnest about it. They knew that the Indian, unaccustomed to any such thing as a tax collector coming around and taxing him for the privilege of life, would make no provision for the protection of himself against the call of the tax collector and that he would lose his land because the taxes would accumulate and the land would be sold for taxes.

The Indian leaders, as I say, knew this, and they therefore insisted upon this provision. The provision was a wise one as far as the ward of the Government was concerned.

Those Indians needed protection just as if they were little children. They were little children in the sense of property rights. They did not think of the land as belonging individually to a person except to the extent he had his home upon it, together with his little fence and his little acknowledged corrals and the right to raise his cattle and have his hogs upon the public domain. The Indians were content with that mode of life.

But when the United States for good reasons agreed to the tax-exempt provisions, and I approved of it at the time, the tax-exempt provisions were granted as a property right. In the *Choctaw* case the Supreme Court held that a property right granted by tax exemption was a payment and a liquidation of a debt of the United States for which the United States was responsible morally, equitably, and in righteousness to the people of Oklahoma.

Nor does the United States suffer by that provision, because through these agreements under the tax-exempt provision the United States is now receiving \$50,000,000 per annum, and the State of Oklahoma may justly say to the United States: "Out of that \$50,000,000 which you are receiving, you should make just and equitable compensation for the tax-exemption privilege which you conveyed to the Indian in liquidation of this debt." No moral answer can be made to that proposition. It is a question of the conscience of Congress, of the



good judgment, I should rather say, because the conscience of Congress is dependable whenever the facts are understood. There is no higher body in the world than the great legislative court of the people of the United States, who rank the world in education and in the advanced science of conquering nature and producing all that human life can desire.

I have no fear of the conscience of Congress. The difficulty in this case will be to get busy men to understand the fundamental facts and fundamental principles with regard to it.

With great diligence and great patience the authorities of Oklahoma have gone into these tax records, county by county and section by section, and have laid before you this morning an abstract showing that the ad valorem taxes of which the State has been deprived amounts to \$75,000,000 up to the date of the statement. This deprivation goes on to some extent until all of those lands become taxable. The obligation of the United States to the State of Oklahoma has been long since acknowledged in principle, so I think the first duty of this committee will be to ascertain the principles of justice which apply and first determine that the Congress of the United States owes it to the people of these different States to adjust this tax exemption as a matter of justice and right.

When that shall have been determined, the accountant can deal with these figures. You can never set a limit with meticulous accuracy, and that is not at all necessary. It is sufficient to make a broad adjustment of this matter according to a wide public policy, according to the principles of morality and justice.

This question was raised by A. Grant Evans shortly after statehood. He pointed out that some of the counties had no taxable property that could support schools, so he appealed to the Congress of the United States to make an appropriation of a special amount covering this lack of taxable property, and Congress made what was believed at the time to be a generous contribution for educational purposes and which I have had the surprise of meeting in the Court of Claims in the charge against the Cherokee Indians.

We must not be unkind in criticizing the administration of justice in our country, but, after all, human life follows the lines of judgment of individuals who happen to be charged at the time with the administration of the law. We have to take that into account. I do not refer to this matter in any invidious sense or in the ordinary sense of complaint; it is a matter which would naturally be discussed in the courts, where the matter has been.

The matter which is before this committee is the determination of a broad principle: Has the United States an obligation to the people of Oklahoma to reimburse the taxpayers of Oklahoma, including, for that matter, a large part of the Indian population who long since have become subject to taxes? Has the United States the duty to reimburse the taxpayers of Oklahoma for the losses inflicted contrary to sound public policy, contrary to justice, and contrary to the rights of the inhabitants of the State of Oklahoma under the Constitution of the United States, under the pledge of the Government of the United States in the French treaty, by which these lands were acquired, and finally, regardless of the Constitution and the limits of the French treaty, the common sense which should govern such a matter?

It seems to me that the committee is first confronted with the necessity of determining fundamental principles: Has any State the



right to reimbursement for tax exemption thus provided? If so, what is the measure of compensation which the people of the entire United States should make to the taxpayers of this State? It is easy for us to ascertain what the fundamental facts are and so give the Government full credit for all payments made to the State, which properly and justly should apply in the liquidation of this obligation of the Government of the United States to reimburse the individual State for its losses due to the exemption from taxes of the citizens of the State.

We need not be punctilious with regard to the legal aspect of this matter. We are not in a court of law; we are before the highest legislative court in the world. The judges sitting on the bench in the Senate and in the House have plenary power to do what is right. It is to that forum that this appeal is made.

I received not very long ago a letter from the Governor of Oklahoma asking my friendly cooperation in this matter, and I have been invited by the attorneys representing the State to appear here and make this argument. I have done so with the profound conviction that the Government of the United States is obliged in good conscience, in honor, and from a high sense of national policy to discharge its debt to the taxpayers of Oklahoma and to the State of Oklahoma.

That sympathetic resolution of the State of Texas is in itself testimony of the highest character with regard to the justice of this claim.

The United States is the leading Nation of the world and has become such by a constitution based upon justice and right and maintained by its people through every struggle, and with a public conscience that is growing continually more and more enlightened.

Let us give thanks to Almighty God for the radio, which enables people to hear the truth. They shall know the truth, and the truth shall make them free, and our Nation will rise in majesty and dignity to lead the world in righteousness, as it will lead the western hemisphere in the doctrine of the brotherhood of man.

I thank the committee.

The CHAIRMAN. Senator Owen, we thank you for your statement. Judge King, have you any further evidence to present?

Mr. KING. This evidence, as I stated previously, will initially consume not more than 30 minutes' time, but it might be that certain members of the committee would like to ask questions and know more about the details. So, it being the time it now is, we want to inform ourselves as to the pleasure of the committee.

The CHAIRMAN. If it is agreeable to those present, I think we may proceed.

Mr. KING. I should now like to have the committee hear from Mr. B. D. Crane, the deputy tax commissioner and director of the ad valorem tax division of the Oklahoma Tax Commission.

The CHAIRMAN. We will be very glad to hear from him.

#### STATEMENT OF B. D. CRANE, DEPUTY TAX COMMISSIONER, DIRECTOR OF THE AD VALOREM DIVISION, OKLAHOMA TAX COMMISSION

Mr. KING. What is your name?

Mr. CRANE. B. D. Crane.

Mr. KING. What official position do you hold?

Mr. CRANE. That of deputy commissioner of the Oklahoma Tax Commission and also that of director of the ad valorem tax division of the Oklahoma Tax Commission.

Mr. KING. As such did you supervise the preparation in your department of certain information having for its purpose the ascertainment and compilation of the amount of money which the State of Oklahoma would have collected in ad valorem taxation on exempt Indian lands from 1908, the year of statehood, to and including the year 1937?

Mr. CRANE. Yes, sir; two estimates were made, both of which were made by me and under my direction.

Mr. KING. Will you take the paper I now hand you and in your own way explain to the Senate committee what it is and how you arrived at the results?

Mr. CRANE. The first estimate is based on figures furnished by the Bureau of Indian Affairs, showing the approximate number of tax-exempt acres in 1908, the first year after statehood; the number of tax-exempt acres in 1936; and a further statement showing the number of acres which became amenable to taxation each year from 1921 to 1935, inclusive.

From those figures we estimated the number of acres which would have been tax exempt for each intervening year. After getting or obtaining that estimate, we applied the average value per acre at which other land was assessed for each of the years and then applied the average tax rate at which other land was taxed for each of the years to determine the total amount of taxes which would have been paid for each year and for the 30 years as a whole.

On this basis the total amount which would have been paid on the Indian lands had they been taxable is \$75,014,174.

The second estimate was made entirely independent of the figures which were furnished by the Indian Bureau, and the number of acres of tax-exempt land each year was based upon information and figures contained in the reports of the Indian Bureau and the reports of the Dawes Commission. Those reports gave us the starting figures for 1908 and 1909 together with information for other years as to the number of acres that had become amenable to taxation. Then using our own records of the general trend of taxation—that is, the general trend of acreage becoming taxable each year—we estimated the number of tax-exempt acres each year from 1908 to 1937, inclusive. To those figures we applied, as we did in the first estimate, the average value per acre and the average tax rate per thousand dollars to determine the total amount of taxes which would have been paid on tax-exempt Indian land had that land been taxable.

The total on that basis is \$75,556,532, or very, very close to the estimate.

In using the average value per acre and the average tax rate per acre we were more than fair, because the Indians as a general rule were permitted to select their allotments. Actually, at the present time the average value of the land now owned by Indians and now tax exempt is somewhat greater than the average value of land which is now subject to taxation.

Furthermore, the average tax rate per acre for the State as a whole, which was used in these estimates, is somewhat less than the average tax rate per acre in the Indian counties. Eastern Oklahoma, which is all Indian territory and practically all within the territory of the

Five Civilized Tribes, has substantially higher tax rates than western Oklahoma, particularly the northwestern counties, where there is no Indian land. So, the figures of approximately \$75,000,000 are, to say the least, very conservative.

In addition, these estimates do not include any taxes which might have been paid on town lots which were owned by the tribes for some years after statehood. Furthermore, they do not include any estimate of taxes which might be lost because of the Congressional Act of 1936, which attempted to remove from taxation all lands purchased out of restricted funds of restricted Indians.

Moreover, they do not include any estimate of taxes which might have been collected on the coal deposits in the segregated coal lands, which coal deposits were reserved to the tribes.

Still further than that, they do not include any estimate of the amount of money which is returned to the local governments by the State from State taxes. For the year 1936-1937 the local governments levied a total of approximately \$43,000,000 for their own support. Approximately \$40,000,000, or almost 50 percent of the grand total, was returned by the State to the local governments. There is no allowance for that included in these figures.

These figures represent merely my best judgment, my estimate, of the amount of taxes which would have been paid on an ad valorem basis on the tax-exempt Indian land, not including town land had such land become taxable during that time.

When I said that the highest tax rates in the State are in the Indian territory, that was significant, because undoubtedly a large amount of the bonded indebtedness which has been and is now outstanding against those counties and other subdivisions of government is due to the fact that this large valuation was tax exempt. In other words, some of those bonds—quite a number of them—would not have been voted—would not have needed to be voted—had the lands become taxable and the regular levies applied to such lands. It was necessary to issue those bonds to build school houses which sometimes cost only \$1,000; yet if the Indian land had all been taxable, the regular general fund levy would have taken care of the situation.

The tax rates in some of the counties are exceedingly high. Some counties today in Oklahoma do not collect more than 25 percent of all ad valorem taxes levied on property other than railroad and public service corporation property. The taxpayers in some of the counties are refusing to pay taxes and will not pay taxes. There is more or less a tax strike because of those high rates caused largely by a very high bonded indebtedness.

At the present time almost 50 percent of the total ad valorem tax levy in the State of Oklahoma is for sinking fund purposes or is to retire bonds and pay interest thereon.

Mr. KING. Have you allocated as to counties in any manner the amount of the tax you have just testified to?

Mr. CRANE. Yes, sir; we have made an estimate of the allocation, by counties, of the total of \$75,556,532. That estimate is more or less arbitrary, and the figures are not as accurate as the figures showing the total amount, because it was necessary to make the allocation largely on an area basis. In other words, we had no figures on the Cherokee Nation to show the tax-exempt acreage for the various years so questioned. But by taking it largely on an area basis, we were able to get figures which were not very far off, we think.

Mr. KING. From that allocation, without reading it to the committee, please pick out four or five representative counties and state to the committee the amount of tax allocated to each of such counties.

Mr. CRANE. The lowest amount of tax allocated in any county is \$8,177 to Logan County, and the highest amount allocated to any county is \$2,513,707 to Caddo County.

The grand total of \$75,000,000 means an average per county to each county for some Indian land, of a little less than \$1,000,000 per county, as we have 77 counties. However, there are some twelve or fourteen counties which have no Indian land at all, so that would increase the average per county to probably \$1,000,000 or \$1,250,000.

Mr. KING. Mr. Crane, how many years experience have you had in dealing with tax calculations and land appraisements for taxation purposes in the State of Oklahoma?

Mr. CRANE. I spent a little more than 7 years as head deputy county treasurer in McIntosh County, which is an Indian county, having Cherokee and Creek allotments. Since that time I have spent 3 months as assistant secretary of the State board of equalization, which is the State assessing agency of Oklahoma, and a little more than 7 years as head of the ad-valorem division of the Oklahoma Tax Commission, which has to do with the adjustment of railroad and public service corporation property and the equalization of properties locally assessed, and also the guiding of county assessing officials in their work. That makes a total of about 15 years, Judge King.

I now offer the tabulations referred to and ask they be printed as part of the record.

The CHAIRMAN. Without objection, the tabulations referred to will be placed in the record at this point.

(The document referred to is as follows:)

*Total Indian non-taxed lands, by years*

[Records of Oklahoma Tax Commission]

Year	Total acres for State	Average value per acre	Total value	Average tax rate per \$1.000	Total tax
1908	20,534,941	\$13.01	\$267,159,582	\$16.78	\$4,482,439
1909	17,198,045	12.37	212,739,817	20.01	4,259,924
1910	15,424,550	11.99	184,940,355	14.46	2,672,357
1911	14,782,855	17.88	264,317,447	14.50	3,856,962
1912	14,113,490	16.16	228,073,514	15.65	3,569,330
1913	13,462,265	15.18	204,357,183	16.98	3,408,759
1914	12,791,970	14.83	189,704,915	14.15	2,684,324
1915	12,125,675	15.12	183,340,206	17.93	3,287,290
1916	11,482,980	14.82	170,177,794	18.17	2,731,774
1917	10,834,985	15.16	164,258,373	18.22	2,992,788
1918	10,171,120	14.95	152,059,290	19.16	2,913,459
1919	9,509,495	18.58	175,686,417	20.76	3,638,050
1920	8,853,200	18.66	163,200,712	21.44	3,541,965
1921	8,194,805	18.25	149,555,191	22.60	3,379,947
1922	7,545,610	18.21	137,405,558	23.69	3,255,138
1923	6,877,515	17.16	118,018,157	27.19	3,208,954
1924	6,256,020	17.12	107,103,062	27.19	2,912,172
1925	5,752,525	16.70	95,067,167	27.49	2,640,898
1926	5,218,630	16.63	86,788,817	24.92	2,162,708
1927	4,707,135	16.58	77,102,871	26.40	2,037,599
1928	4,315,940	16.40	70,781,416	28.10	1,988,859
1929	3,990,445	16.06	64,182,907	30.37	1,949,252
1930	3,685,150	16.03	59,072,955	30.71	1,811,179
1931	3,456,755	14.48	50,053,812	29.42	1,472,967
1932	3,245,690	11.95	37,814,299	30.98	1,157,452
1933	3,036,265	10.17	30,878,415	26.49	817,967
1934	2,825,770	10.16	28,709,823	24.94	716,922
1935	2,691,375	9.98	26,859,823	26.79	719,197
1936	2,558,480	10.02	25,635,970	26.34	675,281
1937	2,413,925	9.74	23,511,630	25.26	593,966
Total	248,063,816	14.79			75,546,532

*Tax prorated by counties on nontaxable Indian land from preceding table*

Adair.....	\$429, 587	McClain.....	\$1, 478, 949
Atoka.....	1, 158, 926	McCurtain.....	2, 013, 173
Blaine.....	1, 091, 111	McIntosh.....	1, 175, 772
Bryan.....	2, 381, 819	Marshall.....	1, 327, 044
Caddo.....	2, 513, 707	Mayes.....	957, 018
Canadian.....	617, 968	Murray.....	902, 506
Carter.....	1, 908, 168	Muskogee.....	2, 137, 266
Cherokee.....	707, 959	Nowata.....	919, 920
Choctaw.....	1, 835, 598	Noble.....	984, 265
Cleveland.....	255, 276	Okfuskee.....	1, 295, 429
Coal.....	1, 384, 107	Oklahoma.....	95, 721
Comanche.....	1, 455, 368	Oklmulgee.....	1, 872, 964
Cotton.....	809, 197	Osage.....	1, 569, 952
Craig.....	997, 786	Ottawa.....	1, 458, 704
Creek.....	2, 349, 782	Pawnee.....	851, 274
Custer.....	567, 895	Payne.....	323, 770
Delaware.....	553, 857	Pittsburg.....	2, 267, 569
Dewey.....	290, 744	Pontiac.....	2, 074, 287
Garvin.....	2, 433, 927	Pottawatomie.....	1, 249, 395
Grady.....	2, 563, 764	Pushmataha.....	1, 165, 615
Haskell.....	1, 411, 389	Roger Mills.....	54, 179
Hughes.....	1, 541, 732	Rogers.....	1, 194, 017
Jefferson.....	1, 422, 021	Seminole.....	1, 233, 558
Johnson.....	1, 476, 640	Sequoyah.....	1, 180, 237
Kay.....	1, 605, 382	Stephens.....	1, 693, 179
Kingfisher.....	173, 777	Tillman.....	512, 096
Kiowa.....	876, 928	Tulsa.....	2, 106, 462
Latimer.....	761, 497	Wagoner.....	1, 074, 577
Le Flore.....	2, 307, 269	Washington.....	807, 203
Lincoln.....	230, 430	Washita.....	355, 411
Logan.....	8, 177		
Love.....	1, 119, 332		75, 566, 532

*Total Indian nontaxed lands, by years, based on Indian Department figures as to acreage*

Year	Acres non-taxable	Average value per acre	Total value	Average tax rate	Total taxes
1908.....	18, 654, 888	\$13.01	\$242, 700, 090	\$16.78	\$4, 072, 508
1909.....	16, 903, 725	12.37	209, 069, 078	20.01	4, 184, 072
1910.....	15, 287, 163	11.90	183, 293, 084	14.46	2, 650, 418
1911.....	13, 803, 325	17.88	246, 839, 211	14.59	3, 601, 384
1912.....	12, 458, 211	16.16	201, 324, 689	15.65	3, 150, 073
1913.....	11, 245, 820	15.18	170, 711, 547	16.68	2, 847, 468
1914.....	10, 168, 153	14.83	150, 793, 708	14.15	2, 133, 730
1915.....	9, 222, 210	15.12	139, 585, 175	17.93	2, 500, 969
1916.....	8, 416, 960	14.82	124, 789, 792	16.17	2, 017, 042
1917.....	7, 743, 371	15.16	117, 389, 504	18.22	2, 138, 836
1918.....	7, 204, 476	14.95	107, 706, 916	19.16	2, 063, 664
1919.....	6, 800, 305	15.58	106, 349, 606	20.76	2, 223, 019
1920.....	6, 530, 854	16.60	108, 605, 735	21.44	2, 312, 801
1921.....	6, 396, 134	18.25	116, 729, 445	22.60	2, 638, 085
1922.....	6, 181, 291	18.21	112, 561, 300	23.66	2, 690, 577
1923.....	6, 094, 515	17.18	104, 581, 877	27.19	2, 843, 581
1924.....	6, 013, 751	17.12	102, 955, 417	27.19	2, 799, 357
1925.....	5, 911, 537	16.70	98, 722, 667	27.49	2, 713, 846
1926.....	5, 853, 315	16.63	97, 340, 628	24.92	2, 425, 728
1927.....	5, 790, 822	16.38	94, 853, 664	26.40	2, 504, 136
1928.....	5, 736, 638	16.40	94, 080, 863	28.10	2, 643, 672
1929.....	5, 690, 160	16.16	91, 480, 329	30.37	2, 778, 257
1930.....	5, 658, 753	16.03	90, 709, 810	30.71	2, 783, 698
1931.....	5, 639, 438	14.44	81, 659, 062	29.42	2, 402, 409
1932.....	5, 618, 023	11.67	65, 436, 667	30.08	1, 968, 034
1933.....	5, 600, 233	10.11	56, 954, 369	26.49	1, 508, 721
1934.....	5, 598, 246	10.16	56, 776, 579	24.44	1, 416, 007
1935.....	5, 577, 578	9.88	55, 007, 141	26.79	1, 489, 661
1936.....	5, 564, 285	10.02	55, 754, 135	26.34	1, 468, 563
1937.....	5, 551, 376	9.74	54, 070, 402	25.26	1, 365, 818
Total.....					75, 014, 174



Mr. KING. From your experience as stated, please state to the committee, for the benefit of the record, any further observations you may have to make in reference to the effect on the local subdivisions—counties, school districts, and townships—and the State as a whole, as you see fit, Mr. Crane.

Mr. CRANE. At the present time we have a number of counties that are finding it very difficult and increasingly difficult to operate. With the low percentage of tax collections in some counties, caused primarily by high rates and the lack of valuation in those same counties and other counties, we are faced today with a very strong possibility of having a complete break-down in our local government in some counties.

If this money could be obtained, it could give very, very substantial relief to the taxpayers in those counties where that situation exists, particularly if the money should be applied to the payment of those outstanding bonds. The tax rates could be very materially reduced, and after they were reduced we could then get the taxpayers to resume paying taxes, and we could resume operations as we should operate.

Mr. KING. In that connection, are school districts in the State of Oklahoma continuing to burden themselves for needed revenues at this time?

Mr. CRANE. They most certainly are, and not only school districts but also counties, cities, and towns.

Mr. KING. I hand you a clipping from the Daily Oklahoman of the day before yesterday. Will you state to the committee what that is?

Mr. CRANE. That is a report of seven bond issues aggregating \$65,200 being approved by the attorney general.

Mr. KING. For what?

Mr. CRANE. For school districts.

Mr. KING. State the lowest amount of bond issue in that list.

Mr. CRANE. The lowest is \$1,200, and the highest amount is \$14,000.

Mr. KING. So, for the purpose of raising as small a sum as \$1,200, many of the school districts must resort to the bond-issue method?

Mr. CRANE. Yes. It should be understood, I think, that the State of Oklahoma has done in 30 years what most of the other States have done in from 100 to 200 years. In that short time Oklahoma has had to build all of its State roads, all of its school houses, nearly all of its courthouses, and nearly all of its churches. It has done everything within that short space of 30 years that every other State has done. That, then, itself, has necessitated more bond issues being outstanding at the present time, possibly, than is the case with older States.

We think that our school system ranks very high. We think our road system ranks very high. Those things have cost us a tremendous amount of money and have placed upon us a heavier burden in a short period of time than would ordinarily be the case. That burden has been much heavier, is today much heavier, and will continue to be much heavier than that of any other State until all present outstanding bonds are retired or some compensation is made by the Federal Government so that we can take care of those bonds without levying such terrifically high tax rates as we have had to do in some counties.

Mr. KING. I hand you a document marked "Bulletin No. 27," entitled, "Indettedness of local governments in Oklahoma as of June 30,



1936," prepared by the Oklahoma Tax Commission, division of research, and direct you to the statistics which appear at page 7 thereof. Will you examine that or any other page you wish to in that document and tell the committee briefly the history of local indebtedness from 1931 to 1936, inclusive?

Mr. CRANE. This chart shows the gross funded debt of the local governments in Oklahoma for the fiscal years 1931-32, 1932-33, 1934-35, and 1935-36.

It shows that the gross funded debt for the fiscal year 1931-32 was \$203,453,000. For the next year, the year 1932-33, it was \$197,106,147. For the year 1934-35, it was a total of \$178,498,814. For the year 1935-36 it was \$170,401,302.

Mr. KING. As bearing on the State indebtedness distinguished from local debts the following letter from the research division of the Oklahoma Tax Commission is offered.

The CHAIRMAN. Without objection the letter referred to may be inserted in the record at this point.

(The letter referred to is as follows:)

OKLAHOMA TAX COMMISSION,  
RESEARCH AND STATISTICS DIVISION,  
Oklahoma City, April 29, 1938.

Mr. C. W. KING,  
Mayflower Hotel, Washington, D. C.

DEAR MR. KING: Under separate cover I am mailing you a copy of Bulletin No. 27, as requested in your letter of April 27.

The amount of outstanding bonded State debt as of this date is \$9,281,000. But there is now in the sinking fund available to be applied on this bonded debt the sum of \$726,615.55. About \$102,000 per month is set aside from the general revenue fund for the retirement of this bonded debt.

This sum does not include any deficit that may exist in the State General Revenue Fund at this time. Such deficit, it is estimated, will be approximately \$9,000,000 as of June 30, 1938, and it will be necessary for the legislature to fund this deficit.

Trusting this gives you the information you wish, I am

Very truly yours,

L. D. MELTON,  
Director, Division of Research.

Mr. KING. The total taxes collected in Oklahoma for State and local purposes as nearly as records show, is reflected by letter from the ad valorem division of Oklahoma Tax Commission.

The CHAIRMAN. Without objection the letter referred to may be inserted in the record at this point.

(The letter referred to is as follows:)

OKLAHOMA TAX COMMISSION,  
AD VALOREM DIVISION,  
Oklahoma City, April 30, 1938.

Hon. C. W. KING,  
Mayflower Hotel, Washington, D. C.

DEAR JUDGE KING: I am in receipt of your telegram of April 26, requesting me to give you the total amount of ad valorem taxes levied for the State and all subdivisions since statehood.

This information is not available, except for 4 years which are as follows: 1931, \$68,944,000; 1934, \$41,942,337; 1935, \$44,133,341; 1936, \$42,993,484.

The amount of taxes levied for each of the last 5 years is substantially less than it was for a number of years prior to that, this reduction being due principally to the constitutional amendment in 1933 which eliminated the State tax and all levies for township general fund purposes. There was also a 20 percent general reduction in valuation in 1932 and a 10 percent general reduction in 1933 in valuation, which substantially reduced the amount of taxes levied.

It is my belief that the total amount of ad valorem taxes levied since statehood up to and including the year 1937 was between \$1,100,000,000 and \$1,200,000,000.

Yours very truly,

B. D. CRANE,  
Deputy Commissioner.

Mr. KING. Adverting to the tax-exempt Indian lands, I hand you a document signed by the Oklahoma Tax Commission under date of November 1936, addressed to all county assessors in the State of Oklahoma concerning the nontaxable Indian lands which they are not to put on the assessment rolls.

Will you briefly state the contents of that and tell the committee if those lands are not being assessed by virtue of being exempt Indian lands?

Mr. CRANE. This letter shows principally all the Indian lands of the Five Civilized Tribes are now tax exempt.

Judge King, I would not say that none of those lands is being taxed because that has been one of the great troubles arising from tax-exempt lands—to determine just what lands are taxable and what are not, and to get the lands that are taxable properly assessed and those not taxable kept off the tax rolls.

A year or two ago we did some work in Sequoyah County and found several thousand acres—my recollection is that there were about 20,000 acres—of taxable land which was not on the tax rolls—some of it had not been on since 1908—and some eight or nine thousand acres of tax-exempt land which was assessed, so actually we do have, all the time, some exempt land assessed and some taxable land not assessed.

Mr. KING. First, Mr. Chairman, I want to introduce for the record a statement of the superintendent of the Osage Agency as reported to the Department of the Interior a statement of the revenues derived from oil and gas sources in Oklahoma from June 1901 to June 1937. That is offered for the general information of the committee.

The CHAIRMAN. Such data as you desire to have included in the record, please submit to the reporter, and without objection it will be incorporated in the record.

Mr. KING. Thank you.

(The document referred to is as follows:)

*Revenues derived from oil and gas sources from June 1901 to June 1937*

June 30	Gross barrels	Oil royalty	Gas royalty	Bonus	Interest on deferred bonus	Rentals	Total
1901	\$10,536	\$553.25	\$50.00				\$1,033.25
1902	10,522	398.26	50.00				448.26
1903	52,217	2,932.71	25.00				2,957.71
1904	90,806	9,551.34	162.50				9,713.74
1905	1,868,260	128,268.42	628.70				128,897.12
1906	4,514,094	227,289.32	977.02				228,266.34
1907	5,847,167	268,378.40	3,202.08				301,580.48
1908	4,775,289	243,610.36	3,185.50				246,795.86
1909	4,819,462	245,300.00	2,713.53				248,013.53
1910	5,091,424	251,053.52	2,897.65				253,951.17
1911	9,418,769	514,359.66	3,151.55				517,511.21
1912	9,445,609	632,734.55	3,441.92	\$39,436.00			645,612.47
1913	7,787,030	773,982.19	4,318.03	498,182.88			1,276,482.80
1914	11,091,791	1,351,271.71	7,120.37			\$1,158.27	1,359,550.35
1915	7,252,788	538,377.52	10,841.60			12,591.06	561,810.18
1916	9,905,477	979,083.01	123,996.77	2,084,300.00		30,338.00	3,198,319.78
1917	9,943,919	2,622,145.27	803,639.73	1,662,490.78		108,323.49	5,196,599.27
1918	10,908,376	3,808,489.28	807,717.16	4,824,942.89		94,901.21	9,533,050.04
1919	12,138,086	4,561,733.33	838,941.38	5,447,732.44		130,950.31	10,999,357.46

# LOSS OF REVENUE—TAX-EXEMPT INDIAN LANDS

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Revenues derived from oil and gas sources from June 1901 to June 1937—Continued

June 30	Gross barrels	Oil royalty	Gas royalty	Bonus	Interest on deferred bonus	Rentals	Total
1901	\$17,077,248	\$8,079,778.46	\$972,763.32	\$8,611,874.72	\$87,728.72	\$114,094.37	\$17,806,237.59
1902	20,621,614	10,267,544.34	1,041,291.86	6,044,938.92	281,898.92	119,324.84	17,754,908.27
1903	28,941,934	8,542,898.93	692,701.87	11,613,401.99	401,117.57	117,773.45	21,367,988.42
1904	41,810,178	13,084,877.86	1,023,693.75	15,261,507.39	1,062,309.33	106,082.07	30,502,500.40
1905	37,577,908	10,776,366.01	1,103,189.14	11,804,103.89	835,322.08	151,561.69	24,670,542.12
1906	33,662,179	9,793,164.73	1,351,420.10	14,577,607.18	969,893.37	163,923.50	26,856,008.88
1907	25,682,848	8,793,235.12	1,504,629.60	10,603,568.84	938,850.38	131,183.43	22,023,587.37
1908	25,884,734	9,016,825.90	1,370,012.01	8,112,103.06	340,667.71	140,639.19	18,980,267.57
1909	21,741,225	5,050,418.41	1,081,131.94	5,220,778.57	116,821.84	80,427.96	11,555,578.72
1910	18,629,115	3,857,778.54	1,068,109.57	2,338,730.00	87,962.17	88,619.27	7,441,259.55
1911	13,711,611	3,310,200.24	865,473.24	658,911.61	15,672.25	109,810.67	4,990,068.01
1912	11,453,342	1,999,039.73	622,514.78	107,748.75	2,839.67	95,029.67	2,827,169.60
1913	9,897,085	1,121,349.79	377,429.04	28,313.50	278.96	63,554.04	1,590,924.43
1914	8,871,544	1,100,941.74	290,943.59	113,518.75	286.85	38,902.80	1,514,593.73
1915	11,675,640	1,593,491.55	296,030.73	1,177,762.50	2,785.32	36,056.17	3,206,126.27
1916	16,015,210	2,802,553.29	329,061.38	1,731,440.76	12,253.01	36,664.63	4,912,013.07
1917	16,565,694	2,941,987.59	390,887.77	1,208,955.00	3,248.00	36,888.85	4,581,967.21
1918	16,775,480	3,241,222.54	361,566.99	324,757.25	0.00	37,455.38	3,995,002.16
Total...	489,160,174	122,697,100.47	17,359,791.46	114,077,235.87	5,160,033.25	2,052,755.63	261,346,916.68

Mr. KING. Mr. Crane, from the exhibit I have just introduced in evidence, I now hand you a compilation made by Mr. Walter Steph, auditor of the Oklahoma Tax Commission, on gross production. Can you briefly tell the committee from the respective dates here the amount of tax that would have been collected on that gross production had it not been exempt?

Mr. CRANE. A total of \$6,471,431.80 for the period from January 1, 1908, to April 30, 1921, and a total of \$27,494,964.40 from April 30, 1921, to December 31, 1937, or a grand total of \$33,966,396.20.

Mr. KING. That gross production became taxable in 1921, and the figures you have just given for the period from 1921 to 1937 represent taxable production, do they not?

Mr. CRANE. That is my understanding; yes, sir.

Mr. KING. Mr. Chairman, are there any questions you would like to ask Mr. Crane?

The CHAIRMAN. If any questions arise, we will ask them from time to time. I have none for the moment.

Mr. KING. Do you have some further suggestion to make, Mr. Crane?

Mr. CRANE. I have none.

The CHAIRMAN. Mr. Crane, if you have further data that you would like to submit for the record, such as documents, you may do so.

Mr. CRANE. I have none, Mr. Chairman.

Mr. KING. At this time we would like to ask permission to furnish after the hearing any additional information which we may have overlooked.

The CHAIRMAN. Before the hearings are concluded, if you will indicate to the committee the particular items you desire to furnish, Judge King, the committee will authorize their inclusion in the record.

Mr. KING. One other matter, Mr. Chairman, and we will have concluded.

I now offer a statement of the oil and gas receipts from 1904 to July 1, 1937, of the Five Civilized Tribes, as reported by the agent at Muskogee to the Commissioner of Indian Affairs and ask that it be made a part of the record.

The CHAIRMAN. Without objection, it will be received for the record.

(Statement entitled "Comparative Statement of Oil and Gas Receipts From Beginning, 1904, to July 1, 1937," is as follows:)

*Comparative statement of oil and gas receipts from beginning, 1904 to July 1, 1937*

Fiscal year:

1904.....	\$1, 300. 00
1905.....	91, 634. 00
1906.....	323, 553. 44
1907.....	775, 480. 15
1908.....	1, 692, 627. 58
1909.....	1, 813, 460. 28
1910.....	1, 420, 894. 97
1911.....	1, 365, 826. 32
1912.....	1, 134, 432. 34
1913.....	1, 496, 179. 31
1914.....	2, 059, 826. 14
1915.....	1, 953, 055. 37
1916.....	4, 091, 916. 65
1917.....	4, 431, 645. 53
1918.....	4, 676, 628. 15
1919.....	4, 523, 522. 95
1920.....	5, 077, 977. 92
1921.....	5, 625, 642. 37
1922.....	3, 875, 671. 82
1923.....	5, 609, 736. 63
1924.....	3, 580, 007. 76
1925.....	4, 214, 100. 31
1926.....	4, 859, 731. 93
1927.....	4, 846, 091. 69
1928.....	5, 374, 345. 99
1929.....	5, 638, 919. 52
1930.....	6, 034, 267. 18
1931.....	3, 364, 728. 95
1932.....	1, 453, 004. 15
1933.....	1, 422, 014. 34
1934.....	1, 458, 197. 56
1935.....	1, 783, 429. 92
1936.....	2, 305, 552. 62
1937.....	2, 035, 411. 00
Total.....	100, 616, 826. 40

Mr. KING. I want to ask the committee to hear at this time a former Representative from Oklahoma, one who has lived in the western part of the State, along with yourself, Mr. Chairman, the area which perhaps endured the greatest burden in surviving double taxation in order to sustain the State government. That gentleman is the Hon. James V. McClintic, former Representative, whom I shall ask to make such statement for the record as his experience in Oklahoma may indicate.

#### STATEMENT OF HON. JAMES V. McCLINTIC, A FORMER REPRESENTATIVE FROM THE STATE OF OKLAHOMA

Mr. McCLINTIC. Mr. Chairman, I am sure I voice the sentiments of all those appearing here when I extend thanks to you and the members of your committee for the splendid manner in which you have allowed us to occupy the time this morning.

I do not care to take up more than a minute or so of time, because it is rather late.

This hearing has resolved itself into two points, as I see it, and one is: Has the Congress ever passed any legislation based upon a moral right? We who have served as Members of Congress know that this happens every year. We know that in hundreds of instances, especially in matters of pension claims, where persons are deprived of the right of obtaining pensions because of some legal technicality or some provision of law, the committee looks into the merits of the case and makes a favorable report based upon a moral claim.

Then there is a second question: Has the Congress ever recognized an obligation to a State or a subdivision of a State where by law the State or subdivision has been denied the right to collect taxes upon certain land within the State?

I respectfully wish to call your attention to a precedent which is almost "on all fours" with the particular point in question. We find that in the Sixty-ninth Congress, first session, July 13, 1926, contained in chapter 897, page 915, Forty-fourth Statutes, No. 2, a law was passed containing retroactive features which went back for a period of 10 years and allowed certain subdivisions of territory within the States of Oregon and Washington to collect taxes on lands which had been taken from the State by congressional legislation, thus depriving those subdivisions within that State of the right to collect taxes. If it had not been for Congress or the Government instrumentalities denying the State officials of Oklahoma the right to collect taxes, then we would not be here today before this committee.

So, we find that Congress did recognize that right and did pass an act. Section 1 of that act reads:

The Treasurer of the United States, upon the order of the Secretary of the Interior, shall pay to the several counties in the States of Oregon and Washington, out of any money in the Treasury not otherwise appropriated, amounts of money equal to the taxes—

Mind you, it says "taxes"—

that would have accrued against said lands for the years 1916 to 1926, inclusive, if such lands had remained privately owned.

The CHAIRMAN. Do you have any record of the amounts so certified to the United States Treasury and the amounts that were paid in order to conform to that law?

Mr. McCLINTIC. Yes, sir. For a period of about 10 years or the retroactive period, the amount that had been returned to those different counties was in excess of \$10,000,000. The amount that is carried in the appropriation bill this year is \$500,000.

Senator CHAVEZ. The same provision is still being carried out?

Mr. McCLINTIC. The same provision is still being carried out. In other words, Congress has established the precedent that wherever it takes away from a State or a subdivision a right that relates to the levying of taxes, the governmental body so affected may come to Congress and ask for legislation to reimburse it. In that case the legislation was passed in 1926 and was retroactive, if you please, for a period of 10 years.

So, Mr. Chairman, I have merely added this to the splendid statements made by those who preceded me, in order to show to the members of this committee that Congress right now, this minute, is carrying out the spirit of that which we are seeking in behalf of the State of Oklahoma.



I think it would be of interest, probably, to the members of the committee to have a few figures that relate to the condition of the Indian Territory when it became a State, and I shall present that information to you.

The area of Indian Territory was 31,000 square miles, consisting of 19,840,000 acres. When it became a part of the State, it had a population of 392,060.

According to the Dawes Commission, the land was divided as follows: Choctaw Nation, 6,950,043 acres; Chickasaw Nation, 4,793,108 acres; Cherokee Nation, 4,420,070 acres; Creek Nation, 3,072,813 acres; and the Seminole Nation, 365,854 acres; making a total of 19,511,888 acres.

The remainder of the land formerly in the Indian Territory was owned by the Quapaw Tribe, with the exception of a small acreage used for town sites and railroad rights-of-way.

Thus, it can be said that there were less than 100,000 acres of taxable land within the entire Indian Territory when it became a State. Oklahoma Territory consisted of 2,979,200 acres, with a population of 398,331.

Some 2,055,500 acres in Oklahoma Territory were reserved for schools, colleges, and so forth. It was for this reason that the sum of \$5,000,000 was appropriated to be used in taking care of schools in lieu of sections 16 and 36, which were reserved for school purposes in Oklahoma Territory.

In addition, there were a number of tribes of Indians in western Oklahoma whose lands were exempt from taxation, and when the matter is finally summed up it seems that for more than 25 years the owners of taxable land have had to pay twice as much as they would have paid had all of the land within the State been made to bear its proportionate part of defraying the expenses of the State government.

I have already said that 19,511,688 acres of Indian lands were not taxable when the State came into the Union. I have before me a statement from the World Almanac of 1937, page 556, which indicates that in the Indian Territory there were in 1930, 19,551,890 acres of land. The only reason for the discrepancy is that my statement took care of the Five Civilized Tribes as was outlined by the Dawes Commission and did not take into consideration the other scattered tribes throughout the State.

So, up to and recently as 1930, 8 years ago, there was almost as much nontaxable Indian land in Indian Territory as there was when that part became a portion of the State of Oklahoma.

Mr. Chairman, I wish to thank you and the members of the committee for the privilege of appearing here. We hope that when this matter is finally considered we will receive not only for the State of Oklahoma but for all other States the kind of consideration that will enable them to receive compensation based upon the same principle and the same problem as we feel those States and the State of Oklahoma are entitled to.

Mr. CRANE. Mr. Chairman, may I make a further statement?

The CHAIRMAN. Yes.

Mr. CRANE. The total number of acres assessed in 1908 was 17,002,114; the total number of acres actually assessed in 1937 was 40,382,497, which shows pretty well the spread over that period of years. There were 23,000,000 more acres assessed last year than in the first year after statehood, and there is a still larger number of acres tax-exempt.



Mr. KING. It was stated by me in my original statement that there are a number of tribes about which we have not sufficient data to place in the record. Among those are the Kiowas, for example. Instead of introducing facts at this time piecemeal, I shall collect them all and introduce them all at one time.

The CHAIRMAN. That may be done.

Mr. KING. We respectfully ask the committee to make such finding as it thinks in its judgment the facts warrant, and in such form that the amount so found, after allowing for offsets or credits which in the judgment of the committee should be allowed, may be the basis of appropriate legislation to provide for an adequate equalization of this burden between Oklahoma and the other States, and also in such form as in the judgment of this committee would most appropriately make the reimbursement to the State with the least inconvenience to the Treasury Department, the Bureau of Indian Affairs, and the Congress.

The CHAIRMAN. I want to thank the witnesses for their appearance here and their presentation of this case, which is, as I regard it, wholly in the public interest. It is one of those cases that remain moot until finally adjudicated and passed upon by the proper authorities.

If the proponents, represented by Judge King, desire to present further data, further documents, or further statements, if you will prepare them and submit them to the secretary of the committee they will be printed along with the hearing that has been held this morning.

Do I now understand that as far as you know, with that liberty, the case is closed?

Mr. KING. The case is closed, with that liberty, and the only immediate data that I would like to furnish is the additional period that I mentioned as to the Five Civilized Tribes.

The CHAIRMAN. Do I understand that the Indian Bureau has no suggestion to make or no testimony to offer?

Mr. DODD. We have no testimony to offer at this time, Mr. Chairman. This is a matter that is not under the direction of the Department in any sense; it is a survey or a study to be made by the committee or by the Congress. It does affect a problem that is not confined in its entirety to Indian relations because of the huge areas in national parks, national forests, and other public-domain lands. The same problem that is affecting the Indians is affecting those areas.

The situation in Oklahoma, of course, is emphasized more by reason of the oil production, especially in the Five Tribes and in the Osage.

I should like to make this observation: That as the committee makes its study, I foresee a request coming for expenditures by the Federal Government both in behalf of the Indians and in behalf of their activities. It is going back over a long period of time. I do not believe that an accurate statement of those expenditures can be obtained from any source other than the General Accounting Office.

In the case of the Five Civilized Tribes, the General Accounting Office has already compiled data and filed it with the Court of Claims in connection with the suits pending there. It seems to me that much of the information as to the expenditures of Federal funds will have to come from that agency. The Indian Office and the Department stand ready to furnish whatever information the committee may ask for. In some cases, I am sure, it is going to take a long time to gather the facts together.

Senator CHAVEZ. I should like to receive permission from the chairman to insert in the record the same information with respect to the State I represent. It is really worse, as far as we are concerned, because the Federal Government owns practically 67 percent of the entire area of New Mexico, that percentage being composed of Indian lands, national parks, reclamation, public domain, and forests. I will try to obtain that information right away.

The CHAIRMAN. That permission is granted, and the same permission will be given to other members of the committee who may wish to submit such data.

It occurs to me that this hearing will probably lead to the following activity, and I speak only for myself as one member of the committee: Very soon this record will be printed and will be placed in the hands of the members of the committee for consideration and study. If the committee, after a study of the record, is of the opinion that the claim has merit in equity and in justice, it would be very proper, in my opinion, for the committee by some formal action to recite that fact and give some evidence of making a further study, in which event, it occurs to me, the committee may be justified in calling upon the Indian Bureau, the Secretary of the Interior, the Department of Justice, probably the Treasury Department, and probably the Comptroller General to ask that they consider the proposal and submit such suggestions as may occur to the representatives of those departments.

In line with what has been said by Mr. Dodd, representing the Indian Office, it occurs to me that before any determination could be made that might be final or satisfactory, we would have to have not only the claims of the State or States but also the offsets that might be prepared and submitted and probably urged by the agents of the Government.

As I said awhile ago, this is now apparently an open question and a live question and will remain so until it is thoroughly studied, investigated, and passed upon.

That, it occurs to me, would be the probable procedure that would be followed by the committee. That would lead us to a final determination of whether or not Congress should undertake the matter or whether it should not undertake the matter.

I am hopeful that whatever is done by the committee may result in an adjudication which will be considered fair finally; and should relief be due, the State of Oklahoma, New Mexico, or the other States where this question or similar questions are involved would know that whatever is done may be done over a wide area and not limited to any one State. It is obvious that Congress cannot provide relief for one State and deny similar relief to other States having the same problem. So, it may be advisable for the representatives of Oklahoma to join forces with representatives of other States to the end that this matter may be expedited for early adjudication. I am not sure how that outline will appeal to or suit the proponents of this legislation, but it is only my suggestion.

Mr. KING. For the information of the chairman and the other members of the committee, Oklahoma not only through its representatives but through other constituted State authorities has communicated with all other States having an Indian population and Indian-exempt land, inviting their participation in this matter. From 14 States we have received letters from the chief executives expressing

**PAYMENT FOR ADJUSTMENT OF CLAIM OF THE  
STATE OF OKLAHOMA v. UNITED STATES**

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**HEARING**  
BEFORE THE  
**COMMITTEE ON INDIAN AFFAIRS**  
**UNITED STATES SENATE**  
SEVENTY-SIXTH CONGRESS  
FIRST SESSION

ON

**S. J. Res. 109**

A JOINT RESOLUTION PROPOSING A PLAN FOR THE  
ADJUSTMENT OF THE CLAIM OF THE STATE OF  
OKLAHOMA AGAINST THE UNITED STATES  
ARISING FROM THE TAX EXEMPTION OF  
INDIAN LANDS AND THE PRODUCTS  
THEREOF, AND FOR OTHER  
PURPOSES

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APRIL 3, 1939

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Printed for the use of the Committee on Indian Affairs



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## PLAN FOR ADJUSTMENT OF CLAIM OF STATE OF OKLAHOMA v. UNITED STATES

MONDAY, APRIL 3, 1939

UNITED STATES SENATE,  
COMMITTEE ON INDIAN AFFAIRS,  
*Washington, D. C.*

The committee met, pursuant to call, in the hearing room of the Senate Committee on Indian Affairs, Senate Office Building at 10:30 a. m., Senator Elmer Thomas of Oklahoma (chairman) presiding.

Present: Senators Thomas of Oklahoma (chairman), Chavez, Frazier, Donahey, Wheeler Ashurst, Bulow, Hatch, O'Mahoney, Johnson of Colorado, and Shipstead were present either in person or by proxy.

Present also: Senator Josh Lee Hon. Robert L. Owen, Hon. William Zimmerman, Jr., Assistant Commissioner of Indian Affairs, and C. W. King, Esq., special counsel, who with Albert C. Hunt, Esq., represent the State of Oklahoma.

The CHAIRMAN. The committee will be in order. This meeting was called for the purpose of considering Senate Joint Resolution 69. Subsequent to the introduction of Resolution 69 the attorneys for the State of Oklahoma presented a new and amended resolution and requested that I introduce same. I introduced the amended resolution on March 28, and it is known as Senate Joint Resolution No. 109.

As I understand, the claimants desire to have the committee consider the latter resolution in place of the former resolution.

The history of the matter is as follows: At the last Congress a resolution was introduced proposing to secure some benefits for the State of Oklahoma because of the failure of the Indians of Oklahoma to pay taxes on their property, and it is contended by the State that inasmuch as Indians do not pay taxes in Oklahoma upon their property, the State should not lose the taxes. The only other source from which money could be secured would be the Government of the United States.

In order that the record may be complete, without objection, I will introduce the printed hearings held last year and ask that same be made a part of the hearings on the resolution just mentioned, Resolution 109. It will not be necessary to reprint the hearings that were had last year but, for all intents and purposes, the contents of the hearings will be made a part of these hearings and will be available for whatever value they contain.

As I understand it, it is the desire of the claimants to have the committee consider Senate Joint Resolution 109. At this point I will place first a copy of Resolution No. 69 into the record, which is to be followed by Resolution 109, being amended Senate Joint Resolution No.

69. These resolutions follow Senate Resolution 168, Seventy-fifth Congress, on which hearings were held during that Congress. The Secretary of the Interior's report on Senate Resolution No. 168 (75th Cong.) is as follows:

THE SECRETARY OF THE INTERIOR,  
Washington, October 9, 1937.

HON. ELMER THOMAS,  
Chairman, Committee on Indian Affairs,  
United States Senate.

MY DEAR SENATOR THOMAS: Further reference is made to your letter of August 5, requesting a report on Senate Resolution 168, authorizing the Committee on Indian Affairs to hold hearings to determine the alleged loss of revenue sustained by certain States due to exemption from taxation of Indian lands, etc.

In connection with this proposed study, attention is invited to the fact that at a meeting of the National Emergency Council, on December 17, 1935, the President appointed a committee, composed of the Attorney General, the Secretary of the Treasury, and the Acting Director of the Bureau of the Budget to make a study of the problem arising from the acquisition of real property by the Federal Government and the consequent loss of tax revenues by the States and lesser political subdivisions because of the exemption of such property from State and local taxation. In compliance with Budget circular, dated June 30, 1936, reports showing the area and approximate value of Indian lands and improvements exempt from State and local taxation as of June 30, 1936, were secured by the Commissioner of Indian Affairs and forwarded to the Procurement Division of the Treasury Department for compilation and study. A request from the Director of Procurement is now pending for additions and changes up to and including June 30, 1937, and the information will later be made available. It is understood that the Director of Procurement now contemplates the submission of reports by field units promptly after a change in real property is made in order to keep this data current.

It appears also that a similar study was made by a subcommittee on Indian Affairs in accordance with Senate Resolution 282 and Senate Resolution 432 (71st Cong.) and a copy of the subcommittee's partial report, dated April 13, 1932 is on file in this Department. Presumably, no final action was ever taken on its recommendations of this subcommittee.

While the records will doubtless show that there are some instances in which the States and lesser political subdivisions are disadvantaged by reason of Federal ownership or control of real estate, in general it is believed that the various States and other political units derive as much benefit from compensating advantages of Federal ownership or control of tax-exempt property as they lose in uncollected tax revenues.

Moreover, it is a well-known fact that the lands existed as Federal domain before the States were created and the State and county governments were established with full cognizance of this fact. It is hardly consistent for the States now to contend that a loss is sustained in tax revenue because of the existence of such tax-exempt property within their borders.

If, after giving consideration to these facts, the Committee on Indian Affairs desires to proceed with a further study of this matter, I have no objection to the passage of Senate Resolution 168.

Sincerely yours,

CHARLES WEST,  
Acting Secretary of the Interior.

(S. J. Res. 69 and 109 are as follows:)

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[S. J. Res. 69, 76th Cong., 1st sess.]

JOINT RESOLUTION Proposing a plan for the adjustment of the claim of the State of Oklahoma against the United States arising from the tax exemption of Indian lands and the products thereof, and for other purposes.

Whereas the Constitution of the United States requires the States of the Union to be admitted on terms of equality; and

Whereas the inhabitants of the States to be erected out of the lands of the Louisiana Purchase were expressly pledged the right to be admitted as States on terms of equality; and

Whereas the United States removed thirty-one tribes of Indians from fifteen other States, relieving such States of tax-exempt Indian lands and putting the burden exclusively upon the inhabitants of Oklahoma, thus imposing a serious



burden upon the people of Oklahoma by the imposition upon them of the additional taxes necessary to establish the safeguards of government, the erection of courts, the protection of life and property, the construction of roads and bridges, the maintenance of schools, penal institutions, hospitals, and other governmental services for the protection of all of the people: Now, therefore, be it.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That a joint committee, consisting of three Members of the Senate and three Members of the House of Representatives, shall be appointed with the duty of ascertaining the extent to which the people of Oklahoma have suffered loss because of the tax exemption of Indian lands and the oil and gas arising therefrom.

That such committee shall report to the Congress of the United States the taxes received by the United States from such State annually since statehood in order that justice may be done in the settlement of this claim.

That in the liquidation of such indebtedness the amount found due shall be distributed annually through a period of ten years in equal payments by deducting from the taxes paid by the people of Oklahoma to the United States an amount sufficient to liquidate the obligation.

That the Secretary of the Interior shall be charged with the duty of stating the account through certified public accountants, or at his discretion through the accounting officers of the Interior Department; and the Secretary of the Interior shall give credit to the United States for all contributions to such Indian tribes since statehood which would have been borne by the State of Oklahoma to such Indians as citizens thereof; and the Secretary of the Treasury is hereby authorized and directed to carry out the purposes of this Act by remitting to the treasurer of Oklahoma, annually, the amount found due by the Secretary of the Interior and certified to the Secretary of the Treasury.

[S. J. Res. 166, 76th Cong., 1st sess.]

**JOINT RESOLUTION** Proposing a plan for the adjustment of the claim of the State of Oklahoma against the United States arising from the tax exemption of Indian lands and the products thereof, and for other purposes

Whereas the Constitution of the United States requires the States of the Union to be admitted on terms of equality; and

Whereas the inhabitants of the States to be erected out of the lands of the Louisiana Purchase were expressly pledged the right to be admitted as States on terms of equality; and

Whereas the United States removed thirty-one tribes of Indians from fifteen other States, relieving such States of tax-exempt Indian lands and putting this burden exclusively upon the inhabitants of Oklahoma, thus imposing a serious burden upon the people of Oklahoma by the imposition upon them of the additional taxes necessary to establish the safeguards of government, the erection of courts, the protection of life and property, the construction of roads and bridges, the maintenance of schools, penal institutions, hospitals, and other governmental services for the protection of all of the people: Now, therefore, be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That a joint committee, consisting of three Members of the Senate and three Members of the House of Representatives, shall be appointed with the duty of providing a plan for an accounting to be made by the Secretary of the Interior. The plan shall require the ascertainment of the losses to the State of Oklahoma of taxes arising from the tax exemption of Indian lands and the products thereof from November 16, 1907, to June 30, 1939. Such plan shall give credit to the United States for all contributions by the United States inuring to the benefit of such Indians as citizens of the State of Oklahoma which otherwise the State of Oklahoma would have been required to bear.

The Secretary of the Interior shall certify to the Secretary of the Treasury the amount found due to the State of Oklahoma after allowing the credits aforesaid. The Secretary of the Treasury shall remit to the treasurer of the State of Oklahoma annually, one-tenth of the amount so found due by the Secretary of the Interior until the total amount shall have been liquidated.

The appropriation for such liquidation is hereby authorized.

**SENATOR FRAZIER**: Is the situation different in Oklahoma than it is in other States where Indians have property?

**The CHAIRMAN**: The facts are that Oklahoma was designated by the Government as the retreat where Indians were sent from other

States. Indians were inhabitants of many other States and in many cases they were driven forcibly from those States and from their former reservations and former grounds to the State of Oklahoma. I think the record will show that we have the remnants of some 52 tribes who came from every direction, north and south, east and west, and these lands were set aside in the main for these Indian tribes. As lands became scarce elsewhere, the white people turned their attention to Oklahoma and, in the course of these events, the Indians have lost land in Oklahoma and the white man has taken these lands.

Senator FRAZIER. I would suggest also that they lost it through crooked manipulation of the white people.

The CHAIRMAN. That in various cases would be more or less true.

Senator CHAVEZ. Mr. Chairman, I am sympathetic with the general proposition here, but may I ask this question? What was the status of the Oklahoma land at the time that the Indians were transferred from Mississippi and Alabama, for instance?

The CHAIRMAN. It was no man's land in the main. Some of it was thought to be an area of waste. They thought it was largely desert. Nobody apparently wanted it. It was known as no man's land. There are parts of the State where on the surface it appeared not to be valuable, but it seems that under that land they have found oils and minerals and it has proved to be very valuable.

In order that the attorneys for the claimants may be permitted to make their case, I will ask Judge King to take charge and to present such evidence as he sees proper. I also understood that Senator Owen is interested in the case with Judge King and, as we proceed, the members of the committee may ask the attorneys any questions that any member thinks proper.

Judge King, you may proceed.

#### **STATEMENT OF CLIFFORD W. KING, SPECIAL COUNSEL FOR THE STATE OF OKLAHOMA, OKLAHOMA CITY, OKLA.**

Mr. KING. Mr. Chairman and members of the committee, for the sake of accuracy, I should like to make a preliminary statement which I think will clarify the general issue in the record.

The presentation today of the position of Oklahoma on the pending resolution involves some repetition of matter presented to your committee at the last session of the Congress. The hearing last year was too late in the session to allow sufficient consideration to enable the committee to make a report on the resolution.

We sincerely hope those members of the committee who were present last year will be indulgent while we review certain material facts you have already heard.

Senate Joint Resolution No. 109, by your chairman, is designed to distribute among all the States a burden heretofore borne by Oklahoma alone—a burden caused by the exemption from taxation of Indian lands and like exemption of oil, gas, coal, lead, zinc, and other minerals from all taxation since statehood. This immunity from taxation was superimposed upon the State of Oklahoma in discharge of a national obligation of the United States to the Indian. The obligation arose and was contracted by the Government in the following manner:

The Indians, before being brought to Indian Territory, enjoyed exemption from taxation of the lands occupied by them east of the

Mississippi River and elsewhere. In order to induce the Indians to relinquish their existing rights the Government, by treaties with the various tribes, promised them lands in the West, from free taxation, and guaranteed to them that the area so occupied would never be incorporated into any State. The lands so granted to the Indians comprised the Indian Territory, now the eastern half of the State of Oklahoma.

The new State immediately enacted laws for the raising of revenue to establish State and local government which it sought to apply to the Indian lands, and revenue measures applying to oil, gas, and other minerals taken therefrom. The State courts uniformly sustained the State's taxing power. On the bench of the Oklahoma Supreme Court were three of the ablest lawyers who were members of the Oklahoma constitutional convention. They were Judges R. L. Williams, later Governor, now United States circuit judge; Justice Samuel W. Hayes, one of the State's most distinguished lawyers; and the late Justice Mathew J. Kane, a jurist of highest order.

The Supreme Court of the United States in the case of *Choate v. Trapp* (224 U. S. 665), as late as 1912, 5 years after statehood, held the lands exempt. We quote the language of the Court [reading]:

Provision making locally taxable lands of Indians of the Five Civilized Tribes from which restrictions have or shall be removed held a violation of the fifth amendment, in view of the Atoka Agreement, embodied in the Curtis Act of June 28, 1898, providing tax exemption for allotted lands while title remained in the original allottee, not exceeding 21 years.

That period was later extended by Congress. It was generally understood that the dissolution of tribal governments, their legislatures and courts, and the granting of full citizenship to the Indians, owning their lands in fee simple, operated to render the lands of all Indians from whom "restrictions have or may be" removed, taxable by the State. Under that belief the constitution of the newly proposed State, comprising Indian Territory and Oklahoma Territory, was adopted in 1907. That is obvious for the reason the first legislature, 1907-08, recognized the taxability of such lands and, as late as 1912, the State courts held the lands and the oil and gas produced therefrom taxable.

The next step, beyond the foresight or preconception of the voters of the State, was the invalidating of the tax laws of the State as applied to oil and gas from Indian lands. Not only the Indians' one-eighth royalty interest, but the entire production, including the oil companies' seven-eighths' interest. Some cases on this point are *Jaybird Mining Co. v. Weir* (271 U. S. 609), *Howard v. Gypsy Oil Co.* (247 U. S. 503), *Choctaw O. & G. R. Co. v. Harrison* (235 U. S. 292), and *Indian Territory Illinois Oil Co. v. Oklahoma* (240 U. S. 522).

The next step was the case of *Gillespie v. Oklahoma* (257 U. S. 501), holding immune from State taxation the net income of a lessee from the sale of his share of oil and gas received under leases of restricted Indian lands. The lessee in the case was Frank Gillespie, a white oil operator of no Indian blood.

A short time ago, 17 years after the *Gillespie case* was decided, it was overruled by the United States Supreme Court, as carrying the doctrine of immunity of Federal instrumentalities from taxation too far. See *Hilvring v. Mountain Producers Corporation* (303 U. S. 376).

Senator CHAVEZ. May I interrupt right there, please?

Mr. KING. You may.

Senator CHAVEZ. As I understand it, in the *Gillespie case* they decided, and kept the rule for quite a while, that the seven-eighths were exempt as far as the State was concerned; is that correct?

Mr. KING. Further than that, Senator, the net income derived from the sale of the seven-eighths interest was held exempt to the non-Indian operator.

Senator CHAVEZ. I understand that that was the income from the subject matter?

Mr. KING. That is right.

Senator CHAVEZ. What effect would that ruling have on the Government taxes on the income?

Mr. KING. The United States Government tax?

Senator CHAVEZ. That is right.

Mr. KING. It would have none because the Government has always had the power to tax this subject matter, because the Government may tax its own instrumentalities, whereas another government cannot; in other words, the State cannot tax the instrumentalities of the Federal Government and neither can the Federal Government tax the instrumentalities of the State.

A further line of decisions held the State inheritance tax did not apply to inheritances of Indian restricted lands. See *Childers v. Beaver* (270 U. S. 555). Some may ask: Why did the State of Oklahoma wait so long to present this claim? It has been litigating the question in the courts, thinking that it could get redress from the courts, being of the firm belief that the subject matter, especially the oil, gas, and other minerals and the income therefrom, were taxable, as has been indicated by the Supreme Court of the United States recently, in decisions in accord with the original contention of the State of Oklahoma.

Everyone familiar with the oil industry knows that whether a given leasehold is exempt from taxes or taxable never entered into the consideration paid the Indian. The expectancy for oil, the proximity to other oil production, and the geological formation, being the sole consideration. As between two tracts, one exempt and one taxable, anyone would purchase the tract affording the greater oil-producing possibilities. The actual fact is that nine-tenths of the purchases are made in the first instance by oil scouts or lease brokers who, when the purchase price is made, do not even know whether the land is taxable or not. So, in our opinion, when the Government through its agencies denies to the State the right to tax lands owned in fee simple by citizens and oil company's seven-eighths' interest in oil and gas produced from an Indian leasehold, or denies a tax on the net income derived therefrom, the Government is morally obligated to make reparation to the State.

Let it be made plain that we do not complain of the Government's policy to extend tax exemption to the Indian as its ward, but we assert with confidence that such privilege of immunity should be borne by all the States and not exacted from the taxable property of the non-Indian citizens of Oklahoma.

The resolution follows in principle the precedent set by Congress in the Oregon-Washington circumstance. There the Government granted to railroads vast areas of lands to develop the Northwest Territory by extending lines of railroad to that section. The rail-

roads forfeited title to larger tracts in which communities of people had settled and counties formed and courts and schools established. When the land reverted to the Government they were, of course, exempt from taxation. This resulted in paralysis of local government. In order to relieve the situation, the Congress passed an act, section 1 of which reads:

The Treasurer of the United States, upon the order of the Secretary of the Interior, shall pay to the several counties in the States of Oregon and Washington, out of any money in the Treasury not otherwise appropriated, amounts of money equal to the taxes that would have accrued against said lands for the years 1916 to 1926, inclusive, if such lands had remained privately owned.

In case any question should arise in the mind of anyone as to the power of Congress to grant the relief, your attention is directed to the following from the Supreme Court of the United States [reading]:

Congress may recognize and pay a claim of an equitable, moral, or honorary nature, and whether the facts are such as to authorize relief is for Congress alone to determine, and where Congress directs a specific sum to be paid to a certain person, neither the Secretary of the Treasury nor any court has discretion to determine whether the person is entitled to receive it.

That is the language adopted in three decisions of the Supreme Court of the United States: *United States v. Price* (116 U. S. 43), *United States v. Realty Co.* (163 U. S. 427, 439), and *Allen v. Smith* (173 U. S. 389, 393).

The Oklahoma Legislature has for several sessions passed resolutions setting out the State's claim and, recently, the legislature passed a resolution on the 3d day of March, this year, the essential parts of which are as follows:

Whereas cause of complaint upon which this petition and claim is grounded arises under the Constitution, treaties, and laws of the United States of America due to the following facts:

First, The State of Oklahoma was admitted to the Union with one-half of its area free from all taxation by the new State.

The acts of Congress under which the State of Oklahoma was admitted into the Union, as enforced by the Supreme Court of the United States (*Choate v. Trapp*, 224 U. S. 665) without constitutional warrant, diminished the sovereign right of the State to levy a land tax for State purposes on land owned by citizens of Indian blood in fee simple; the United States owned no property right in the land exempted at the time the tax exemption, which is a property right, was contracted, for the reason that the Indians at the time owned the land in fee simple; and Congress had no power under the Constitution to enforce such tax exemption by the terms of the act of admission, for the reason that Congress has no power to control a land tax for State purposes, and further because a State cannot surrender a right of sovereignty by the acceptance of the provisions of an act of admission by which the new State is admitted on an equal footing with the other States.

Second, The Five Civilized Tribes of Indians (Choctaws, Chickasaws, Cherokees, Creeks, and Seminoles), the members of which, as citizens of Oklahoma, were exempted by the United States from a State land tax before they were moved to what was later the Indian Territory, held lands east of the Mississippi River under occupancy. The United States by treaties with the various tribes granted to the respective tribes lands in the Indian Territory, in exchange for the lands occupied in the East. The various treaties granted the western lands to the Indians and to their descendants in fee simple and the land was described by metes and bounds. As consideration to induce the Indians to leave their homes and go into an uninhabited area the United States, by treaties, guaranteed to the various tribes that they should be protected in their tribal rights forever and that their land should never be incorporated into any State, without their consent. The United States recognized the Indians as landlords by leasing portions of their lands, buying other parts, and selling them additional land for cash.

Third, The President of the United States, in pursuance of the treaties, executed to each tribe deeds conveying to each such tribe, in trust for the members and their descendants, the land ceded by the treaties aforesaid in fee simple.



The deed specifically reserved the right to reversion or escheat to the United States, in case the Indians became extinct or abandoned their land. This possibility of reversion was specifically waived by Congress (sec. 15, acts, March 3, 1893). Congress consented to the allotment of the land in severalty to the members of each tribe. The President engrafted onto the deed a provision that the Indians could not sell their lands without the consent of the United States; the Supreme Court has consistently held (*March v. Sugar & Western Ind. Co.*, 221 U. S. 286) that this restriction did not affect the property right of the Indians. The deeds to each tribe are similar in all material respects.

On March 3, 1893, Congress expressed by act, a desire to create a State to embrace the Indian Territory within its boundary (27 Stat. 612). Accordingly, a Commission was empowered to negotiate with the Five Civilized Tribes with the view of inducing the Indians (1) to surrender their rights to remain forever free from the government of any State, (2) to partition their common estate and allot to each member of the tribe his equitable share of the tribal land, and (3) to become citizens of proposed new State of Oklahoma.

For the purpose of obtaining relief from the perpetual charge of protecting the Indians in their tribal rights the Commission was empowered, in the event the Indians would not allot their land, to purchase outright the 19,785,781 acres owned by the Five Civilized Tribes (sec. 15, acts, March 3, 1893).

Fourth, The act appointing the Commission empowered the Commissioners to enter into negotiation with the Five Tribes as said in the act, "with a view to such adjustment, upon the basis of justice and equity as may with the consent of such nations or tribes of Indians, be requisite or suitable to enable the ultimate creation of a State," but the Commission, acting beyond the scope of its authority, ignored all principles of justice and equity in that the Commission made, the Congress approved, and the Supreme Court upheld agreements by which the United States was relieved of the burden of protecting the Indians at the sole expense of the future State, which, under Federal policy, was to assume the burden of these people. The Congress, at the expense of the taxpayers of Oklahoma, discharged a national obligation for which it stood pledged to purchase more than 19,000,000 acres of fertile land without cost to the United States Treasury, by guaranteeing to the various tribes tax exemption from future State taxation as follows:

- (1) Cherokees, 40 acres tax-free land as held by allottee.
- (2) Creeks, 40 acres tax-free for 21 years from date of patent (32 Stat. 500).
- (3) Seminoles, 40 acres forever (30 Stats. 567).
- (4) Choctaws and Chickasaws owned 4,000 square miles in a solid body all nontaxable while held by allottee for 21 years from date of patent (30 Stats. 507).

The CHAIRMAN. That was the reservation of each tribe?

Mr. KING. Yes. [Continuing:]

Fifth, In pursuance of the agreement by which the United States guaranteed that they should, for a period, hold land free from taxation, the Indians divided their lands, their tribal courts and legislatures were dissolved, and they became citizens entitled under the Constitution to all immunities enjoyed by other citizens, and to no greater privileges than other citizens enjoy. By the act under which Oklahoma was admitted into the Union "on an equality with the other States" (34 Stat. 267) Congress sought to diminish the sovereignty of Oklahoma by denying to the State the right to tax citizens of Indian blood, to whom the United States had promised tax exemption at the expense of the proposed new State in satisfaction of a national obligation.

Sixth, After admission, Oklahoma never voluntarily relinquished its right to tax, as other lands are taxed, the land owned by citizens of Indian blood in fee simple; the State levied such tax, which was questioned by injunction; the Supreme Court of Oklahoma upheld the State's sovereign right to tax such land, but, on appeal, the Supreme Court of the United States (*Choate v. Trapp*, 224 U. S. 665) sustained the injunction on the ground that the tax exemption was a property right which Congress had power to bestow. Later the exemption of immunity was extended to oil and gas produced from Indian lands; not only the Indian's one-eighth royalty interest but also the oil producer's seven-eighths "working" interest was likewise held to be exempt.

Seventh, The State of Oklahoma has, therefore, been deprived of the sovereign constitutional right to tax, for State and local purposes, land and minerals within the State owned in fee simple; that the act of Congress exempting the land is not the supreme law of the land, but an usurpation of authority not conferred by the



Constitution; and that the Constitution confers no powers on Congress by which the sovereignty of a State may be diminished, impaired, or contracted away by the provisions of the act under which the new State is admitted into the Union.

Eighth. This national obligation, voluntarily assumed by Congress, was judicially recognized by this Court in *Cheate v. Trapp*, where it was held that the Indians furnished a consideration in the surrender of treaty rights "sufficient to enable them to enforce the benefits conferred" in the form of a tax exemption.

Since the United States has compelled Oklahoma to pay this national debt, the State is entitled to an accounting at the expense of the United States and for redress in a sum sufficient to reimburse the State of Oklahoma for the lawful revenue of which the State has been unlawfully deprived.

Ninth. The Indian is a ward of the Federal Government and not a ward of the State of Oklahoma; and

Whereas, further, the Governor of the State of Oklahoma in his inaugural address stated:

"It is my belief that the State of Oklahoma has a just claim against the Federal Government by reason of the exemption of Indian lands from taxation all through the years since statehood.

"I have discussed this problem with as many of our delegation in Congress as possible since my election. \* \* \* and I am hopeful that this injustice can be remedied and the State of Oklahoma receive from the Federal Government the amount of taxes which would have been received by the State had there been no exempt Indian lands through all the years since statehood.

"There never was a time in our history when we were in such dire straits for revenue to carry on as we are at this time \* \* \*"

Now, therefore, be it

*Resolved by the Senate of the Seventeenth Legislature of the State of Oklahoma (the House of Representatives concurring therein), That the State of Oklahoma does hereby represent to the President and to the Congress of the United States that the State of Oklahoma has been unlawfully deprived of its sovereign right to tax lands within the State owned by citizens in fee simple, and oil and gas and other minerals produced from such lands; and an accounting be ordered to ascertain the amount of loss that the State has sustained; for an act requiring the Treasurer and other proper officials of the United States of America to refund annually such sum as will reimburse the State of Oklahoma for the unlawful loss of revenue sustained by virtue of the tax exemptions aforesaid.*

I want to call the attention of the committee to the fact that this is a wholly analogous procedure to that followed in the Oregon case and resolution No. 109 provides that payment be distributed over a period of 10 years. Of course it is within the discretion of the committee to extend that to a greater length of time or make such other amendment as the committee thinks this bill should be subjected to.

Now, Mr. Chairman, there are two documents that I wish to introduce in evidence but, if it is agreeable with the committee, I would like to do that after Senator Owen has made his statement, because it makes it a more consistent record that way.

The CHAIRMAN. Does that complete your statement?

Mr. KING. That completes my statement.

The CHAIRMAN. Senator Owen, do you desire to make a statement?

Mr. KING. Before he does that, if the chairman please, are there any questions that the Senators would care to ask?

Senator FRAZIER. I want to ask something about Mr. King, Mr. Chairman.

Are you a duly elected official of the State of Oklahoma?

Mr. KING. No, sir. I did not make an explanation of that to the committee at this time for the reason that last year we had a hearing at which you were not present, and the chairman asked the following questions and I made the following answers:

The CHAIRMAN. Please state your name for the record.

Mr. KING. Clifford W. King.

The CHAIRMAN. Where do you reside, Mr. King?

Mr. KING. Oklahoma City.

The CHAIRMAN. What is your business?

Mr. KING. Attorney at law. I am now special counsel for the State of Oklahoma. I was for 12 years assistant attorney general of Oklahoma, in charge of tax litigation, and for 5 years attorney for the Oklahoma Tax Commission.

That is on page 4 of the hearings, and my statement before the committee last year follows, which involved some repetition of what we have here.

SENATOR FRAZIER. Are you employed by special resolution of the State legislature or by the attorney general?

Mr. KING. On a special resolution of the State legislature and also under contract with the Governor of the State. That contract provides for a 5-percent attorney fee. The State has paid a small salary and expenses in addition to that. The position of counsel in that matter is to substitute that percentage contract with a quantum meruit agreement to be executed between counsel and the State. The present counsel are the assignees of a previous contract which was on a percentage basis, but the contract of present counsel on a 5 percent contingent fee has heretofore been submitted to the Governor with a request that it be changed so as to confine the compensation to a quantum meruit basis to be determined when the services shall have been performed.

Are there any further questions?

The CHAIRMAN. Judge King, have you a formula for estimating the amount of taxes that the State has lost or that the Government should reimburse the State for?

Mr. KING. The formula is that the Secretary of the Interior shall ascertain from evidence furnished by the State, and from his own records, the amount of taxes exempted from payment, and credit the United States for just offsets thereto and directing the Secretary of the Treasury to liquidate the net indebtedness in 10 equal, annual installments. It is purely an application of the Oklahoma tax rate to the valuation of the lands in Oklahoma, both are matters of record and made a part of the State's case at the hearing last year. As to the oil and gas that is more simple—the value of the oil is of record and the rate of the gross production tax is fixed by law.

The exact formula used in the Oregon-Washington law is:

The amount shall be ascertained by using the assessed value for the year 1915, used by the Secretary of the Interior in arriving at the accrued taxes for 1915, and the rate of taxes prevailing for the several purposes in each county, school district, port district, or civil subdivision thereof for each of such years.

I suggest that Senate Joint Resolution 109 be amended by inserting a similar provision.

An additional document which we wish to introduce shows the income in the form of royalties to the Indians, which, of course, is multiplied by eight and then the 3-percent tax applied to that, and that will run the matter well over \$50,000,000.

The Government has paid a per capita tax for Indian children attending white schools, and various and sundry appropriations which have at least indirectly, if not directly, minimized the tax burden that would otherwise have rested on the State of Oklahoma.

Senator, you were asking me about the contract. When I was attorney for the Oklahoma Tax Commission I made efforts to have the State officially take this matter up and it was presented to the

Governor at that time and his reaction to that was that, due to the fact that State administrations went out of office as often as they do and this being a matter which in his judgment might run over several sessions of Congress and several State administrations, by the time one got started officially on it, he would probably go out of office and there would be a break in the continuity of representation and injurious to the State. His idea was that the only way to get it was that someone who was interested in the matter pursue it from the beginning until there was a final determination.

The CHAIRMAN. Well, Judge King, I suggest that at this point in the record you prepare such data as you think would be beneficial as to the formula that is to be followed in determining how much money you claim is due the State of Oklahoma from the United States Government and that you put that table or formula into the record at this point, so that anyone who has occasion to read the record will see what you have in mind.

Mr. KING. The only formula we can suggest is for the Secretary of the Interior to ascertain from the data furnished by the State and his own records the amount of loss; then deduct from that the offsets due the Government and certify the result to the Treasurer.

The CHAIRMAN. You referred to the resolution. The resolution provides for the appointment of a joint committee, consisting of three Members of the Senate and three Members of the House of Representatives. Who is to appoint those members?

Mr. KING. Congress. If that committee can be appointed by this committee, we will be glad to have the resolution amended that way.

The CHAIRMAN. It is provided that after the committee is appointed they provide a plan for an accounting to be made by the Secretary of the Interior. Do you consider that this committee or the Congress has the power to appoint three Members of the House and three Members of the Senate who will go out and begin legislation.

Mr. KING. No. We thought that the committee would have to be appointed by the Congress, and that is why we left it as it is.

Senator FRAZIER. Would not the plan have to be authorized by Congress?

Mr. KING. The passage of this bill authorizes the plan, leaving the details of the plan to be ironed out by the joint committee and executed by the Secretary of the Interior and the Secretary of the Treasury.

Senator FRAZIER. I am afraid that such a procedure would be questioned and eventually it would be up to the Supreme Court of the United States to decide.

The CHAIRMAN. Judge King, there are several decisions to the effect that if the Congress undertakes to delegate this power the delegation must be hemmed in and hedged about with restrictions and limitations; in other words, there must be certain conditions set forth under which a delegation of power is made and those conditions must be complied with. Then, when the conditions are complied with, the power delegated can be exercised within the limitations. As I see it, this resolution is completely void of any sort of limitations or restrictions. I think if you will search the decisions that will be very clearly set forth.

Mr. KING. Without trying to argue the matter with the committee in any sense, it was our opinion that this committee would be purely

advisory to the Secretary of the Interior. The resolution places upon the Secretary of the Interior the duty of the ascertainment of this amount and his reporting that to the Treasurer, exactly as was done in the *Oregon case*. The committee is to act in an advisory and assisting capacity and its findings or functions have no official standing other than to that extent. The burden of ascertaining it and reporting it to the Treasurer, and the obligation of the Treasurer to pay it, is clearly set forth in the resolution, and the committee's function could be eliminated entirely.

The CHAIRMAN. Do you not think that this resolution delegates to the Secretary of the Interior legislative powers and makes him the judge of matters that belong to the Congress? Your resolution makes him the arbiter of the amount, without any review thereof by Congress. Do you think we have that power?

Mr. KING. Senate Joint Resolution 109 exercises the legislative power; determines the principles upon which the settlement should be made; and directs the executive department to perform the executive functions of finding the facts. The resolution does not, in my opinion, confer upon the Secretary of the Interior any legislative power. He is made merely a fact-finding executive where the legislative principles have already been determined by Congress. We are agreeable to the suggestion contained in the chairman's observation and suggest the resolution be amended by the committee to safeguard the right of review and determination, finally, of the amount.

The CHAIRMAN. I suggest that you get the Oregon act and put it into the record.

The matter referred to is as follows:)

[O. S. C. L. p. 915]

That the Treasurer of the United States, upon the order of the Secretary of the Interior, shall pay to the several counties in the States of Oregon and Washington, out of any money in the Treasury not otherwise appropriated, amounts of money equal to the taxes that would have accrued against said lands for the years 1916 to 1926, inclusive, if the lands had remained privately owned and taxable.

Such amounts shall be ascertained by using the assessed value for the year 1915, used by the Secretary of the Interior in arriving at the accrued taxes for 1915 and the rate of taxes prevailing for the several purposes in each county, school district, port district, or civil subdivision thereof for each of such years.

SEC. 2. The Secretary of the Interior shall ascertain as soon as may be after the approval of this Act the rate of taxation so prevailing, compute the amount to be paid each county for each of such years and issue an order therefor upon the Treasurer of the United States, and file same with his report thereon with the Secretary of the Treasury.

In computing the amounts so to be paid the Secretary of the Interior shall include all Oregon and California land-grant lands title to which remains in the United States on the 1st day of March of each year.

SEC. 3. On or before the 1st day of October of each year after 1926 the Secretary of the Treasury, upon the order of the Secretary of the Interior, shall pay to the several counties amounts of money equal to the taxes upon said lands within such counties, to be ascertained, computed, and reported in the same manner as for the preceding years, until all charges against said "Oregon and California land-grant fund" shall have been liquidated and the said fund shows a credit balance as available for distribution under section 10 of the Act approved June 9, 1916.

SEC. 4. All moneys paid under the terms of this Act shall be charged against the said "Oregon and California land-grant fund," and all proceeds received from the sale of lands, timber, or otherwise, shall be placed to the credit of such fund until all sums charged against such fund are fully and completely liquidated, and until the United States has been so fully reimbursed no distribution shall be made as provided in section 10 of the said Act approved June 9, 1916.

SEC. 5. All moneys paid and received under the provisions of this Act by any county shall be prorated, apportioned, and paid to the State, county, port districts, school districts, road districts, and other civil subdivisions of the county in the same proportion as the taxes assessed, levied, and collected by the county for the year covered by such payment are apportioned and paid, to the State, county, and each civil subdivision will receive the same amount as though the money had been paid by a taxpayer for each year.

Approved, July 13, 1926.

The CHAIRMAN. Proceed.

MR. KING. Section 1 of the act is the one that places the power, and it is as follows [reading]:

The Treasurer of the United States, upon order of the Secretary of the Interior, shall pay to the several counties in the States of Oregon and Washington, out of any money in the Treasury not otherwise appropriated, amounts of money equal to the taxes that would have accrued against said lands for the years 1916 to 1926, inclusive, if such lands had remained privately owned.

In explanation of that those payments were made merely upon showings made by the officers of the States of Washington and Oregon, reported to the Secretary of the Interior, and the Secretary of the Interior certified such amounts to the Treasurer, and payments were made thereon, with no further congressional authority.

However, that is our view and, if in the view of the committee this resolution should be changed completely to accomplish the result of whatever judgment the committee comes to, it is entirely agreeable with the State of Oklahoma for the committee to substitute for this such measure as will completely accomplish what we seek. What we are seeking is reimbursement.

MR. OWEN. Mr. Chairman, may I make a suggestion? I am merely going to supplement what you said.

MR. KING. Proceed and make your entire statement now, Senator.

The CHAIRMAN. You may proceed, Senator Owen.

#### STATEMENT OF ROBERT L. OWEN, FORMER UNITED STATES SENATOR FROM THE STATE OF OKLAHOMA

MR. OWEN. The suggestion I was about to make was that the direction to the Secretary of the Interior to state the account involves no legislative power to the executive department, because the facts of the valuation of these lands upon which the tax would be estimated have been annually fixed. There is nothing that is not of record on the tax rolls of the State of Oklahoma. The valuation of these lands is well known. The valuation of the oil and gas is defined and is part of the record. There is nothing in the matter except to take the existing facts and, by actuaries or public accountants or accountants of the Interior Department, to state the account, giving the United States full credit for all advances made to the State of Oklahoma, directly or indirectly, bearing upon this subject matter, so that I think the form of the resolution, directing a committee or requiring a committee of three of the two Houses to direct a plan, would be nothing more than a plan to make the accounting in detail, which is contemplated for a reimbursement of the taxes which have been withheld by virtue of the governmental action.

If the committee will permit me, I would like to give a very brief review of how this matter arose and why it is morally and ethically a just claim against the Federal Government.



When our Government was established the Indians occupied a very large part of the lands east of the Mississippi River. According to the Royce report, made through the Smithsonian Institution, the grant made by the Cherokees alone involved 81,000,000 acres relinquished by the Cherokees to the Government of the United States—the Seminoles and the Creeks occupying northern and western Florida and portions of Alabama; the Cherokees occupying a large part of Georgia, North Carolina, South Carolina, portions of Virginia, a large part of Kentucky, Tennessee, and northern Alabama; the Choctaws and Chickasaws occupying portions of Alabama, Mississippi, and Louisiana.

Naturally, as the white settlement increased, there came a conflict between the interests of the Indians and the settlers, so that the settlers desired the Indian tribal lands and every inducement was offered by the Government to these particular five tribes to move to the west; and, in the course of our history, it will be remembered that Napoleon Bonaparte, who had become the ruling genius of the French Government as first consul, having had a prolonged controversy with Great Britain, and the French Government desiring that Great Britain should not control any great empire west of the Colonies which revolted, the first consul thought it would be desirable, from a strategic point of view of the conflict between Great Britain and France, that the Louisiana purchase should be conveyed to the United States, and that was arranged in 1803.

As one of the considerations of that transfer of this enormous territory, including the valley of the Mississippi and the tributaries which flowed into it from the west, covering Louisiana, Arkansas—Indian Territory—portions of Colorado, Kansas, Nebraska, Iowa, and other States, the French did not want that to pass into other hands. They did not want it to pass back into Spanish hands. They wanted it to belong to the United States, so that an independent government of great power should be built up as an offset to the power of the British Empire, and that was accomplished by the treaty of 1803 and, as a portion of the consideration of that grant, Napoleon had inserted the language that this territory, as it became capable of development through population, and when the time arose when State government could be established, should be composed of States out of the Louisiana lands, to be admitted into the Union of the States on terms of equality with other States.

At this point I would like to insert into the record a quotation from that treaty, and although I suppose the members of the committee are familiar with it, the record should, nevertheless, contain it. I should like to have Judge King read it.

The CHAIRMAN. Will you read that, Judge King, please?

Mr. KING. This is from article III of the treaty with France, found in Eighth United States Statutes at Large, page 202 [reading]:

The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States.

Mr. OWEN. Now, under the policy of the Government of the United States—a very natural and reasonable policy—the Five Tribes were induced to go to the West and establish themselves in new homes in the Indian Territory—the Choctaws by the treaty of



1820, the Western Cherokee Treaty of 1833, and the Creeks and Seminoles by other treaties. All of the Indian Territory, now the State of Oklahoma, was granted in fee simple to the Five Tribes.

Later on, in 1866, the Government desiring to establish other Indians there, induced the Five Tribes to agree that other Indians might be established on a portion of their western territory, and that took place in due course. As a result of that, Indians from many States were gradually collected and concentrated within the area of what now constitutes the State of Oklahoma. Thirty-one distinct tribes and many portions of tribes were located in Oklahoma under this policy. The Shawnees from Ohio, other Indians from various eastern States, Indians from Texas, Indians from Kansas, Nebraska, Iowa, and Colorado—they were concentrated in Indian Territory and relieved the other States of the burden of tax-exempt Indian lands.

In 1901 every Indian in Indian Territory was made a citizen of the United States before the land was allotted, but when the Government came to allot the land it became necessary to negotiate with the Five Civilized Tribes, who had a pledge from the Government not to extend any Territorial or State government over them or their lands, but to leave them to enjoy the old Indian method of holding land, which was the so-called Indian communal title, which preserved to the Indian tribe the lands free from tax and preventing the alienation of the land upon which the tribe lived.

So strong was this sentiment that the Cherokees had a law by which any individual Indian or group of Indians who attempted to sell the title to the land were outlawed, subject to a death penalty, and those who negotiated the treaty of 1835, although they did it for a patriotic purpose but without authority and had the death penalty visited upon them—Major Ridge and his son, John Ridge, Elias Boudinot, and other leaders. That was a very powerful sentiment among Indian people and they felt that if they were subjected to taxes it would mean the loss of the individual land allotted to their members—a population uninformed and uncommercial, people who lived a free life, but who did not tax themselves. This forecast has proved to be the case, of course.

They, therefore, were very adverse to having a change in the Indian communal system. They wanted to be let alone.

It was a very important matter for the United States to develop these lands. They were fertile; they were capable of high cultivation; they had minerals of value. It was an important matter for the Government of the United States to have that development so as to increase the granary by which the Nation was fed and the supplies of raw materials which were needed for the development of our country.

Under that impulse the United States, therefore, negotiated with the Five Tribes. The Five Tribes resolutely demanded tax exemption, and that was granted by the Government of necessity. I do not think the Government should be reproached for what was done in the slightest degree, because it was a perfectly natural thing to do, and they agreed to the tax exemption.

Immediately after statehood took place the Indians themselves were willing to change and modify that to the extent that there should be a relief from the tax exemption of those who were more than half

white, so there was a removal of restrictions agreed to and the Congress passed a law, at the solicitation of the Indians themselves and of the new State, removing the tax exemption to a large part of this allotted land, but there still remained a very substantial portion of these lands that were not taxed and, as a consequence, many of the school districts in eastern Oklahoma were unable to raise by taxation the necessary money to give adequate schooling and that schooling had to be supplemented by taxes from other parts of the State. The Congress generously contributed several million dollars to help make good this deficit, but the deficit was large and the Congress of the United States, having been responsible for the tax exemption—what remained of the tax exemption beyond the possibility of removal by agreement—left the State of Oklahoma where those who had land subject to taxes were compelled to raise the money necessary to make up the deficit created by tax-exempt lands.

During the course of the years from 1907, when the State was admitted, that has amounted to a very large sum of money. And, more than that, the counties have been unable to raise, by taxation, the moneys necessary to provide the facilities of a civilized government—the building of roads and bridges, the building of public buildings, courthouses, and school houses, charitable institutions, and hospitals.

SENATOR FRAZIER. May I interrupt you there, Senator Owen?

MR. OWEN. Certainly.

SENATOR FRAZIER. We had a number of cases coming from the Western States where the Government satisfied claims for the Indian land before the Territory became a State. They are under the same situation exactly, as I see it, as Oklahoma.

MR. OWEN. I think that is true, but that does not minimize the argument which I am now presenting, and I want to call the attention of the honorable committee to this very important fact: That under this policy the United States, by virtue of the industry and intelligence of the people of Oklahoma and their power to create value through the cultivation of the fields, the development of the mines, the drilling for oil and gas and its refinery, has developed so large a value that the United States Government during the last year, 1938, received \$62,900,000 of taxes from the State of Oklahoma. I insert the figures for the years 1937 and 1938, as follows:

*Internal-revenue collections during 1937 and 1938 from Oklahoma*

1937	
Income tax:	
Corporation .....	\$11, 620, 637 97
Individual .....	7, 718, 252 89
Total .....	19, 338, 890 86
Miscellaneous internal revenue .....	33, 506, 892 39
Pay-roll taxes .....	5, 420, 280 71
Total, all sources .....	58, 266, 063 96

*Internal-revenue collections during 1937 and 1938 from Oklahoma—Continued*

1938

Income tax:	
Corporation.....	15,607,949.37
Individual.....	9,169,604.50
Total.....	24,777,553.87
Miscellaneous internal revenue.....	32,803,573.34
Pay-roll taxes.....	5,376,997.42
Total, all sources.....	62,958,124.63

Source: Comparative statement of internal revenue collections during the calendar years 1937 and 1938, Treasury Department. Released Feb. 2, 1939.

SENATOR FRAZIER. Your State has received a big income from the gas and oil it produces.

MR. OWEN. They have created an income by their intelligence and industry.

SENATOR FRAZIER. And by the deposits that were there by nature.

MR. OWEN. The deposits were there by nature. I might say, in reminiscence, that the first deep well I caused to be drilled in 1884, long before Oklahoma became a State. What I am calling attention to is the fact that the United States has received \$600,000,000 in taxes from those lands which were previously tax-exempt under the treaties with the Five Civilized Tribes.

Therefore, when Oklahoma comes and asks that the State be reimbursed for the losses due to the tax exemption of Indian lands, they have a right to say to the United States:

that was your obligation to the Indians, for which you had been fully paid by lands east of the Mississippi and elsewhere which you received from the Indians in payment for the promise to the Indians to be tax-exempt. Having been fully paid, you should not now complain if, when Oklahoma is charged with the liquidation of the debt, which was your debt, you should be requested in common fairness and justice, to permit an accounting to be made to your own Secretary of the Interior upon facts which are not disputable but which are of record—all of them.

This resolution does not contemplate granting any legislative power to any committee. The plan contemplated is clearly stated in the resolution; the resolution is an instruction to the Secretary of the Interior as to the making up of the accounting and making a report to the committee so that the committee should submit the report to the Congress.

It does not depart in principle from the *Oregon case*, and this morning I received a letter from the Department of Justice, showing the precedent set not only in Washington and Oregon but in California. I would like to put that in the record, if it will be agreeable to the committee, but first I submit for the record 16 precedents and a digest of such precedents. Mr. King, will you read that letter?

MR. KING (reading):

DEPARTMENT OF JUSTICE,  
Washington, D. C., February 11, 1939.

MR. ROBERT L. OWEN,  
Counselor at Law,  
Washington, D. C.

DEAR MR. OWEN: This will acknowledge the receipt of your letter dated February 3, 1939, addressed to the Attorney General, in which you request that you be informed of the cases in which the United States has recognized the rights of the States or counties thereof to reimbursement for taxes lost through the transfer of the lands to the Federal Government.

While the Department of Justice does not have available complete information on this subject, it may be that you will be interested in the following statutes: Oregon and California Land Grant Act of July 13, 1926 (44 Stat. 915); The Five Percent Public Land Funds Act (U. S. C., title 31, sec. 711); Coos Bay Wagon Road Grant Act of February 26, 1919 (40 Stat. 1179); Navajo Indian Reservation Act of March 1, 1933 (47 Stat. 1418); Grazing Act of June 28, 1934 (48 Stat. 1269, sec. 10); Mineral Leasing Act of February 25, 1920 (U. S. C., title 30, sec. 191); Act of March 3, 1921 (41 Stat. 1249, under sec. 5); National Forest Fund Act (U. S. C., title 16, sec. 500); Act of June 20, 1930 (36 Stat. 561); Section 13 of the Federal Power Act (41 Stat. 1092); Section 13 of the Tennessee Valley Authority Act (48 Stat. 66); Section 401 of the act of June 15, 1935, amending the Migratory Bird Hunting Stamp Act of March 16, 1934; Act of June 20, 1936, for the Relief of Certain Indian Lands (49 Stat. 1542); The act of June 29, 1936 (49 Stat. 2025); Act of June 29, 1936 (49 Stat. 2035).

Respectfully,

For the Attorney General:

CARL MCFARLAND,  
*Assistant Attorney General*

(Digest of these opinions are as follows:)

**DIGEST OF CERTAIN ACTS PROVIDING FOR PAYMENTS TO STATES OR COUNTIES IN LIEU OF TAXES ON LANDS OWNED BY THE UNITED STATES**

(R. L. Notz, the Library of Congress, Legislative Reference Service, February 16, 1939)

National Forest Fund Act (16 U. S. C. 500; 36 Stat. 963, sec. 13 amended by 38 Stat. 411): States to be paid 25 percent of national-forest receipts, to be used for schools or roads of the county in which the forest is situated; but such payments are not to exceed 10 percent of the county's income from other sources.

Tennessee Valley Authority Act, section 13 (16 U. S. C. 831i; 48 Stat. 66): Alabama to receive 5 percent of gross proceeds from sale of power from dam 2 or any other hydropower plant constructed in Alabama; Tennessee to receive 5 percent of gross proceeds from sale of power from Cove Creek Dam or any other dam located in Tennessee; upon completion of Cove Creek Dam, each State is to receive 2½ percent of gross proceeds from sale of additional power generated. Board of the Tennessee Valley Authority authorized to change these percentages.

Mineral Leasing Act of February 25, 1920 (30 U. S. C. 191; 41 Stat. 450, sec. 35): States to be paid 20 percent prior to February 25, 1920, and 37½ percent after that date, of receipts from bonuses, royalties, and rentals of mineral lands located within the State; such payments to be used for roads and schools.

Five Percent Public Land Funds Act (31 U. S. C. 711 (17); R. S. 3689): Permanent annual appropriation for payment of 5 percent of net proceeds from sales of public lands in Missouri, Michigan, Florida, Iowa, Wisconsin, Minnesota, Oregon, and Nevada to these States for schools and roads.

Grazing Act of June 28, 1934 (43 U. S. C. 315i; 48 Stat. 1269, sec. 10, amended and superseded by 49 Stat. 1978, sec. 4): States to receive 50 percent of receipts from grazing districts within their borders for the benefit of the county in which such lands are situated, except when the grazing districts are on Indian lands, in which case the States are to receive 25 percent for county roads and schools.

Section 401 of act of June 15, 1935, amending Migratory Bird Hunting Stamp Act of March 16, 1934 (16 U. S. C. Supp. 715c; 49 Stat. 383): States to receive 25 percent of receipts from migratory bird refuges, to be used for schools and roads in the counties in which the refuges are located.

Federal Power Act (16 U. S. C. Supp. 810; 41 Stat. 1072-1073, sec. 17 amended and superseded by 49 Stat. 845, sec. 208): 37½ percent of charges arising from licenses for occupancy and use of national forests and public lands under Federal Power Act within any State to be paid to the State.

Act of June 29, 1936 (40 U. S. C. Supp. 421-425; 49 Stat. 2025): Federal Emergency Administrator of Public Works may enter into agreements with States or political subdivisions in which slum-clearance or low-cost housing projects are located, for payments in lieu of taxes, such payments to be made out of receipts from the projects.

Act of June 29, 1936 (40 U. S. C. Supp. 431-434; 49 Stat. 2035): Resettlement Administration may enter into agreements with States or political subdivisions or local taxing units in which resettlement or rural-rehabilitation projects are located for payments in lieu of taxes, such payments to be made out of receipts from the projects.

Act of June 20, 1910 (36 Stat. 563, sec. 9, 574, sec. 27): States of New Mexico and Arizona to receive 5 percent of receipts from sale of public lands within their borders, for school funds.

Coos Bay Wagon Road Grant Act of February 26, 1919 (40 Stat. 1179): United States to pay accrued, unpaid, and delinquent taxes on Coos Bay Wagon Road grant lands reconveyed to the United States under provisions of this act. After receipts from sales of revested lands in Coos and Douglas Counties, Oreg., amount to a sum equal to accrued taxes and \$2.50 an acre for revested lands, 25 percent of the receipts are to be paid to these counties for schools, roads, etc.

Act of March 3, 1921 (41 Stat. 1250-1252, sec. 5): Oklahoma authorized to collect a gross production tax upon oil and gas produced in Osage County, in lieu of all other State and county taxes upon the production of oil and gas. Such taxes are to be paid by the Secretary of the Interior out of receipts from royalties from production of oil and gas received by the Osage Tribe of Indians. In addition, the Secretary is to pay 1 percent of such receipts to Osage County for roads and bridges.

Oregon and California Land Grant Act of July 13, 1926 (44 Stat. 915-916, ch. 897): Counties in Oregon and Washington, in which are located lands formerly granted to Oregon & California Railroad Co., and revested in the United States under act of June 9, 1916 (39 Stat. 218-223), are to be paid amounts equal to the taxes that would have accrued for the years 1916 to 1926, if the lands had been taxable. After 1926 the Secretary of the Interior is to continue to pay to these counties amounts equal to taxes on lands within the county. After the United States has been reimbursed for these amounts (out of proceeds of land sales, etc.) the proceeds of further sales, etc., are to be distributed as provided in section 10 of the act of June 9, 1916.

(NOTE - The act of June 9, 1916 (39 Stat. 222, sec. 10), provided that after receipts from the sale of revested Oregon and California land-grant lands amount to a sum equal to accrued taxes and \$2.50 an acre for the lands, 25 percent of the remainder is to be paid to the State in which the lands are located, to become a part of the irreducible school fund of the State; also 25 percent to the county for school, roads, etc. The same disposition is to be made of the balance remaining in the Oregon and California land-grant fund, from whatsoever source derived.)

Navajo Indian Reservation Act of March 1, 1933 (47 Stat. 1418-1419): 37½ percent of net royalties derived from any tribal leases of oil- or gas-producing lands added to the Navajo Reservation, under this act, are to be paid to Utah for tuition of Indian children in white schools, or for roads.

Act of June 20, 1936, for the relief of certain Indian lands (49 Stat. 1542, as amended by act of May 19, 1937, 50 Stat. 188): \$25,000 authorized to be appropriated for payment of taxes, etc., assessed against certain restricted individually owned Indian lands, where the Secretary of the Interior finds that the land was purchased with the understanding that it was to be nontaxable. All homesteads, purchased before May 19, 1937, out of trust or restricted funds of individual Indians are declared to be instrumentalities of the Federal Government and nontaxable.

TREASURY DEPARTMENT,

OFFICE OF THE SECRETARY.

Washington, March 31, 1939.

Mr. ROBERT L. OWEN,

*Counselor at Law, Washington, D. C.*

DEAR MR. OWEN: Reference is made to your communication of February 3, 1939, requesting the amount of the annual installments, dates of payment, and the total amount paid pursuant to Public Act No. 523, an act for the relief of certain counties in the States of Oregon and Washington within whose boundaries the revested Oregon & California Railroad Co. grant lands are located (44 Stat., p. 915).

These are transmitted herewith statements of the payments made pursuant to the above act under the appropriations:

"Payments to certain counties of Oregon and Washington in lieu of accrued taxes, 1916-26, against Oregon and California land-grant lands;

"The Oregon and California land-grant fund."

Very truly yours,

W. HEFFELFINGER,

*Assistant Commissioner of Accounts and Deposits*

Mr. KING. Attached to that is a statement showing payments under certain appropriations from 1926 to 1939, by years, making a total payment of \$16,078,543.18, and the payments are made to certain counties of Oregon and Washington in lieu of taxes, and the other column is Oregon and California land-grant funds, as follows:

*Statement showing payments under certain appropriations, 1926-39*

Fiscal year—	Payments to certain counties of Oregon and Washington in lieu of taxes	Oregon and California land-grant funds	Total
1926		\$3,901,088.64	\$3,901,088.64
1927	\$6,102,853.49	240.05	6,103,093.54
1928	1,105,197.07	201,207.00	1,306,404.07
1929	201,922.34	35,732.99	237,655.33
1930	189,829.45	702,699.69	892,529.14
1931	3,855.57	525,214.22	529,069.79
1932		745,778.97	745,778.97
1933		167,764.46	167,764.46
1934		244,249.92	244,249.92
1935		244,305.61	244,305.61
1936	290,588.50	20.00	290,608.50
1937	296,143.26		296,143.26
1938	750,847.55		750,847.55
1939—to Mar. 1, 1939	242,514.39		242,514.39
Total	19,230,750.65	6,837,792.55	16,078,543.18

Includes repayments of \$30,123.39 during the fiscal year 1928 and \$4,971.19 during the fiscal year 1929.

The CHAIRMAN. Does that letter say that the Secretary makes a certificate to the Treasury Department, which makes payment without any appropriation of Congress?

Mr. KING. While I am on my feet, in deference to Senator Thomas question as to the Oregon act, I have it in my hand. If I may do so I will read the whole act or just the part that is pertinent here.

The CHAIRMAN. You may put the whole act [44 Stat. L. 915] in the record if you desire to.

Mr. KING. The particular part as to the computation is about three lines long and it reads:

The Secretary of the Interior shall ascertain as soon as may be after the apportionment of this Act the rate of taxation so prevailing, compute the amount to be paid each county for each of such years, and issue an order therefor upon the Treasurer of the United States and file same year's report thereon with the Secretary of the Treasury.

Mr. OWEN. Mr. Chairman, I would like to put in the record at this point the amount of taxes which the Federal Government has received from Oklahoma since statehood, year by year, so as to give an idea of the manner in which the values have developed there and the manner in which the United States has been compensated under its policy of developing the lands of Indian Territory through statehood.



The CHAIRMAN. Without objection, permission will be granted to do so.

(The document is as follows:)

## PART OF THE INTERNAL-REVENUE COLLECTION, DISTRICT OF KANSAS

Fiscal year	Indian Territory	Territory of Oklahoma	Oklahoma
1906	\$12,271.06	\$78,984.91	\$91,257.97
1907	15,891.95	190,567.60	210,458.55

## TERRITORIES BECOME THE STATE, NOV. 16, 1907

1908			\$100,513.90
1909			78,668.29
1910			111,010.26
1911			154,326.84

## OKLAHOMA DETACHED FROM KANSAS DISTRICT AND CONSTITUTED A SEPARATE COLLECTION DISTRICT, FEB. 6, 1911

1912			\$148,906.24
1913			177,649.40
1914			491,169.88
1915			729,321.50
1916			1,067,259.60
1917			6,880,982.44
1918			19,514,935.46
1919			17,661,704.61
1920			26,286,862.24
1921			27,599,641.12
1922			18,462,452.57
1923			13,679,186.66
1924			13,523,563.14
1925			11,621,795.16
1926			18,653,775.04
1927			21,619,138.67
1928			21,514,887.53
1929			17,993,513.26
1930			18,679,599.43
1931			14,922,121.45
1932			10,197,348.04
1933			24,781,197.04
1934			44,797,190.11
1935			44,377,497.63
1936			44,919,568.21
1937			50,815,475.44

Mr. OWEN. I wanted to call attention to the action taken by the Interior Department upon Senate Resolution 168 of the Seventy-fifth Congress, in which, after reviewing certain facts, Mr. Charles West, Acting Secretary of the Interior, concluded as follows [reading]:

If, after giving consideration to these facts, the Committee on Indian Affairs desires to proceed with a further study of this matter, I have no objection to the passage of Senate Resolution No. 168.

Sincerely yours,

CHARLES WEST,  
Acting Secretary of the Interior.

There is nothing further I care to add except to answer any question that might be asked by any member of the committee.

The CHAIRMAN. Do you care to supplement your statement further?

Mr. OWEN. I will be glad to be permitted to add some material.

The CHAIRMAN. Whatever material you have that you want to submit as an extension of your remarks, if you will get that ready and submit it to the committee, we shall be glad to have it.

Mr. OWEN. Yes.

The CHAIRMAN. Mr. Grorud will get it and make it a part of the record.

Judge King, have you something additional?

MR. KING. I just want to introduce in the record a letter from the Secretary of the Interior giving the amount of payments as to the Five Civilized Tribes and the other tribe of Indians, which include the royalty payments, plus a small bonus, and the amounts thereof are to be multiplied by eight, of course, to make the total, which shows the full amount of money paid during the period covered by the Secretary's letter.

The CHAIRMAN. That may be done.

(The letter is as follows:)

DEPARTMENT OF THE INTERIOR,  
Washington, June 28, 1938.

Hon. WILL ROGERS,

*House of Representatives*

MY DEAR MR. ROGERS: Further reference is made to your letter of April 14 addressed to Secretary Ickes, requesting annual reports showing receipts of oil and gas royalties from Indian lands in Oklahoma since 1907.

By letter of April 22 you were advised that it would be necessary to obtain reports from the field. The reports have now been received and the following is furnished in answer to your request.

*Five Civilized Tribes Agency, Muskogee.* From 1907 to the end of the fiscal year 1937 the Indians of the Five Civilized Tribes Agency received a total income (including royalties, rentals, and bonus) of \$51,521,543.68 from oil and gas operations on their lands. The Superintendent advised that from his records he is not able to subdivide the total and give the amount of royalties, etc., for each year. From 1924 to the end of the fiscal year 1937 these Indians received royalties on production of oil and gas as follows:

Oil royalties	\$34,974,176.32
Gas royalties	538,353.91
Casinghead gas royalties	1,681,012.47

There is enclosed a tabulation from the annual reports of the Superintendent of the Five Civilized Tribes Agency, from which the above figures are taken.

*Osage Agency, Pawhuska.* From 1907 to the end of the fiscal year 1937 the Osage Indians have received the following as royalties from the production of oil and gas:

Oil royalties	\$122,328,106.27
Gas royalties	17,357,898.24

There is also enclosed a tabulation of receipts at the Osage Agency from oil and gas leases, taken from the Superintendent's annual report for the fiscal year ended June 30, 1937.

*Shawnee Agency, Shawnee.* The Indians of this jurisdiction have received the following royalties on production of oil and gas, as shown by the enclosed copy of statement furnished by the Superintendent:

Oil royalties	\$735,794.85
Gas royalties	82,092.83
Casinghead gas royalties	16,114.39
Royalty in lieu of offset wells	300.00

*Kiowa Agency, Anadarko.* Figures are incomplete from the Kiowa Agency prior to 1922 and we have no tabulation of receipts by years. From 1922 to the end of the fiscal year 1937 the following figures represent total royalties on production of oil and gas received by the Indians under the Kiowa jurisdiction:

Oil royalties	\$158,103.82
Gas royalties	36,884.21
Casinghead gas royalties	324.86
Royalty in lieu of offset wells	584.00

*Pawnee Agency, Pawnee.*—The report of the Superintendent of the Pawnee Agency shows that to the end of the fiscal year 1937 the Indians of that jurisdiction have received the following royalties on production of oil and gas. No tabulation of receipts by years is available:

Oil royalties.....	\$731,815.96
Gas royalties.....	24,193.42
Casinghead gas royalties.....	39,537.84

There was no production of oil and gas at the Shawnee, Kiowa, or Pawnee Agencies as early as 1907.

*Cheyenne and Arapaho Agency, Concho.*—Oil and gas leases have been made at this jurisdiction but there has been no production therefrom and therefore no royalties on oil and gas produced have been received.

Sincerely yours,

E. K. BUDLEW,

*Acting Secretary of the Interior.*

MR. KING. This matter had consideration under what was known as the Steiwer report at the Seventy-first Congress. At the last Congress the matter was presented to this committee as per the report on Senate Resolution No. 128 and, as will be recalled in the Steiwer report, it was stated that it was the belief of the committee that the Congress ought to take care of all the Indian exempt lands of the States, the same as if they were taxable.

Now, we would like to make this request of the committee. This matter has been, we think, so far as the principle involved is concerned, fully presented to the committee and fully developed, and the session of Congress, is, of course, coming to a close soon, and we would like to request the committee, if it meets the sense of convenience, to consider this resolution and make its report—

MR. OWEN (interposing). Mr. Chairman, could not a subcommittee be appointed to give critical examination to the language of the resolution, so that if it was found advisable to change the language, it could be done?

MR. KING (continuing). In order that the session may have an opportunity to consider this, and on the question of the form of the resolution, our whole and sole purpose is to accomplish results and we will be glad to cooperate with any subcommittee or any member of the committee in the drafting of the recommendation of the committee on the substitute resolution if, in the mind of the committee, the present one is inadequate.

The claim of the State of Oklahoma, in principle, is extremely simple.

It is a question of common justice and morality and of sound political ethics.

The taxpayers of Oklahoma have had imposed upon them the necessity of meeting tax costs by virtue of the acts of the United States. The tax exemptions on Indian lands were in payment of the obligations of the United States to the Indians for which the United States had been paid in previous treaties. The liquidation of this obligation should rest on the United States as a matter of common justice and not on the taxpayers of Oklahoma.

The taxpayers now ask an accounting to ascertain the amount due, after giving full credit to the United States for all contributions made by the United States properly applicable as a credit. It is proposed that the Secretary of the Interior shall state the account and that the

Secretary of the Treasury shall liquidate the indebtedness found due in 10 equal annual installments by which one-tenth of the amount due shall be annually paid to the treasurer of the State of Oklahoma.

The precedents cited fully sustain the principles involved and the method by which settlement should be made.

The CHAIRMAN. Mr. William Zimmerman, Assistant Commissioner of Indian Affairs, is here, and I will ask him what the Department has to say about it. I want to know whether or not you desire time to present suggestions or statements or recommendations or a defense. We have not time to go into it this morning, as Congress convenes in a few minutes.

Mr. ZIMMERMAN. Obviously the resolution raises certain questions both of law and policy that are very far-reaching. It seems to me that the Department would be very anxious to present not only the history of the matter as it relates to Oklahoma but also indicate to the committee the implications that would flow from the adoption of this resolution.

As Senator Frazier pointed out, there are many similarities between the situation in Oklahoma and other States. I should say that the Department should make a very careful presentation in writing or perhaps present it orally before your committee.

The CHAIRMAN. I am advised that the record shows that we have no reports from the Interior Department upon the original resolution submitted this year, Senate Joint Resolution 69; and, of course, the amended resolution (S. J. Res. 109) having been introduced only a few days ago, it is obvious that no report is available upon that resolution.

It is the policy of this committee and the policy of all committees to refer bills and resolutions to the particular department having jurisdiction. Of course, that policy would have to be followed by this committee.

I am advised further that both resolutions now have been sent to the Secretary of the Interior with a request for report and, as soon as this report is available and is determined, the committee will call another meeting for the immediate consideration of such report; and, if at that time the Indian Office or the Interior Department desires to submit any statement or make any representation in addition to the report, an opportunity will be afforded to do so. That means that the hearings will not be closed and that after the report is submitted by the Interior Department the claimants, acting through their attorneys, will have every opportunity to answer any suggestions made in the report and to submit additional statements and evidence and arguments if desired.

Did you wish to say something, Senator Owen?

Mr. OWEN. I was going to ask if the report could not be called for within a certain period of time, so as not to allow the session to elapse without action.

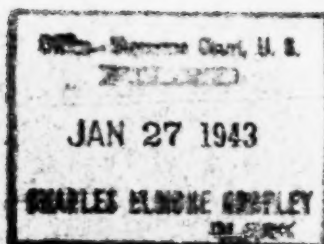
The CHAIRMAN. In answer to Senator Owen's question, after the Interior Department, or any department, prepares its report upon any proposed legislation, the report must go to the Budget Bureau and be considered by the Budget Bureau, and before the report can be submitted to Congress the Budget Bureau must likewise act and

the report must state the action of the Budget Bureau. That has been the practice here. While we could request that the report be expedited, it would not be within our power to do more than submit a respectful request.

It is now past 12 o'clock. The Senate is in session. We will take a recess subject to further call of the Chair.

(Whereupon, at 12:05 p. m., the hearing was adjourned subject to the call of the chairman.)

FILE COPY



Nos. 623-625

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**In the Supreme Court of the United States**

OCTOBER TERM, 1942

---

OKLAHOMA TAX COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH  
CIRCUIT

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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**OPINIONS BELOW**

The district court wrote no opinion. The opinion of the circuit court of appeals is not yet reported but may be found in the record at pp. 151-159.

**JURISDICTION**

The judgments of the circuit court of appeals sought to be reviewed were entered November 13, 1942 (R. 160-161). The petition for writs of certiorari was filed January 5, 1942. The jurisdiction of this Court is invoked under section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTION PRESENTED

Whether restricted property of deceased allottees of the Five Civilized Tribes is subject to Oklahoma inheritance taxes.

### STATEMENT

These were three actions brought by the United States to recover inheritance taxes imposed by the petitioner Oklahoma Tax Commission upon the transfer of the estates of three deceased members of the Five Civilized Tribes and paid under protest by the Secretary of the Interior. In each case, the district court made findings of fact and conclusions of law and entered judgment for petitioner (R. 36-42, 90-96, 140-147). The circuit court of appeals reversed (R. 151-157, 160-161).

The pertinent facts, as found by the district court, are as follows:

No. 623. Lucy Bemore, a full-blood Seminole, died intestate December 23, 1932 (R. 36). Petitioner assessed an inheritance tax of \$5,925.20 upon transfer of her estate (R. 38). The assessment was pursuant to c. 162, Okla. S. L. 1915, as amended by c. 112, Okla. S. L. 1927, which provides that:

A tax is hereby laid upon the transfer to persons \* \* \* of property \* \* \*.

When the transfer is of tangible property in this state made by any person, or

of intangible property made by a resident of this state at time of transfer:

First: By will or the intestate laws of this state; \* \* \* .

Included in the estate was the following restricted property: Decedent's homestead and surplus allotments, and bonds and cash (held by the Secretary of the Interior) representing proceeds from sales of oil and gas produced from the allotted lands. The estate included also other lands purchased for decedent out of restricted funds and held under a restricted form of deed (R. 37). The property was inherited in equal parts by her husband and son (R. 36). Her death freed from restriction the property passing to the husband (R. 38).

No. 624. Nitey, a full-blood Seminole, died testate August 17, 1930 (R. 90). Petitioner assessed an inheritance tax of \$16,053.74 under authority of c. 162, Okla. S. L. 1915, as amended (R. 92). Included in the estate was the following restricted property: Decedent's homestead and surplus allotments, and bonds and cash (held by the Secretary of the Interior) representing proceeds from the sale of oil and gas produced from the allotted lands. The estate also included household goods and a truck (R. 91). Decedent will devised the property in equal shares to her five children, full-blood Seminoles (R. 90). The restrictions were not removed by her death (R. 92).

No. 625. Wosey Deere, a full-blood Creek, died intestate September 2, 1938 (R. 141). Petitioner assessed an inheritance tax of \$14,908.67 (R. 143) pursuant to c. 66, Art. 5, Okla. S. L. 1935, which provides that:

A tax is hereby levied upon the transfer of the net estate of every decedent \* \* \* to persons \* \* \* of property, real, personal or mixed, whether tangible or intangible, or any interest therein \* \* \* by will or the intestate laws of this state \* \* \*.

Included in the estate was the following restricted property: Decedent's homestead and surplus allotments, an inherited allotment, and bonds and cash (held by the Secretary of the Interior) representing proceeds from the sale of oil and gas produced from the inherited allotment. The estate included also an interest in other lands, a judgment, miscellaneous items and life insurance (R. 141-142). Decedent's heirs were her husband and three children (R. 141). The restrictions were not removed by her death (R. 143).

#### ARGUMENT

Petitioner contends (Pet. 14-19) that since the laws of Oklahoma determine who are to be the distributees of the restricted property of deceased Indians of the Five Civilized Tribes, distribution in accordance with those laws may be taxed by that State. The argument, however, assumes that

because the channels of distribution on death are defined by the laws of Oklahoma such distribution is a privilege accorded by the State and can therefore be taxed. This argument confuses the authority to prescribe standards in accordance with which property is to be distributed with the authority to permit the distribution. It is true that the property here in question passes in accordance with the provisions of the Oklahoma laws of descent. But it is only true because Congress has so provided. *Jefferson v. Fink*, 247 U. S. 288; *Blundell v. Wallace*, 267 U. S. 373; *Jackson v. Harris*, 43 F. (2d) 513 (C. C. A. 10); *Dunn v. Micco*, 106 F. (2d) 356 (C. C. A. 10). The privilege of transferring property on death is one conferred on the Indians by Congress, even though in prescribing the manner of its exercise Congress has adopted the standards of Oklahoma. Federal laws rather than the laws of Oklahoma, therefore, constitute the ultimate authority under which allottees are permitted to transmit and their heirs to receive restricted property, although in determining how the property is to be transmitted Congress "adopted the provisions of the Oklahoma Statute as an expression of its own will—the laws of Missouri or Kansas, or any other State might have been accepted. The lands really passed under a law of the United States, and not by Oklahoma's permission." *Childers v. Beaver*, 270 U. S. 555, 559; *In re Estate of Nah-me-tsa-he*, 119 Okla. 300.



Contrary to petitioner's contention (Pet. 20-25), *Childers v. Beaver*, *supra*, cannot be distinguished on the ground that it involved the Act of June 25, 1910, 36 Stat. 855-856, as amended February 14, 1913, 37 Stat. 678, which is inapplicable to Indians of the Five Civilized Tribes. So far as the question here involved is concerned, the status of the restricted property of Quapaw Indians (involved in *Childers v. Beaver*) and that of Indians of the Five Civilized Tribes has always been substantially the same. The United States has controlling authority over both, and the same legislation has made the Oklahoma laws of descent applicable to both.<sup>1</sup> The 1910 Act, as amended, only meant that as to Quapaw property Congress

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<sup>1</sup> Congress made the local laws of descent applicable to the Quapaw Tribe and the Five Civilized Tribes as follows: Section 2 of the Act of April 28, 1904, 33 Stat. 573, provided that the statutes of Arkansas theretofore put into force in the Indian Territory (including chapter 49 of Mansfield's Digest relating to descent and distribution) should be taken "to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise". The Oklahoma Enabling Act of June 16, 1906, 34 Stat. 267, provided (sec. 13) that "the laws in force in the Territory of Oklahoma, as far as applicable, should extend over and apply to said State until changed by the legislature thereof", and (sec. 21) that "all laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said State, except as modified or changed by this Act or by the constitution of the State," thus substituting the Oklahoma law of descent for that of Arkansas formerly in force in the Indian Territory.

so modified existing legislation as to authorize the Secretary of the Interior, rather than the courts of Oklahoma, to determine in accordance with State law who shall be distributees on death and to control the making of wills.<sup>2</sup> The fact that Congress has enacted no similar provision with respect to Five Civilized Tribes restricted property in no way alters the basic consideration that as to both Quapaw and Five Civilized Tribes restricted property the United States and not Oklahoma is the ultimate source of authority for the privilege of testamentary and intestate disposition of restricted property.

Petitioner's assertion (Pet. 23-25) that these tax cases should be regarded in the light of *Blundell v. Wallace*, 267 U. S. 373, rather than *Blanset v. Cardin*, 256 U. S. 319, is of no avail, for both cases show that the United States controls the restricted property of its Indian wards through its laws. The difference between the cases is simply that in the *Blundell* case Congress had provided that Indians of the Five Civilized Tribes might devise their restricted property in accordance with local laws, whereas in the *Blanset* case it had provided

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<sup>2</sup> Consistently with its adoption of the Oklahoma pattern of distribution for the Five Civilized Tribes, Congress authorized the Oklahoma probate courts to supervise the administration of the distribution as prescribed by those laws. In exercising this function, however, the probate courts act as federal agencies. See, e. g., *Parker v. Richard*, 250 U. S. 235; *In re Jessie's Heirs*, 259 Fed. 694 (E. D. Okla.); *In re Fulson's Estate*, 141 Okla. 300.

that Quapaw Indians might make wills in accordance with regulations made by the Secretary of the Interior.

Finally, since the transfer by death of the restricted property here involved took place by permission of the United States, and not Oklahoma, and therefore that State had no right to impose the taxes in question, it is not material, contrary to petitioner (Pet. 26-28), whether or not those taxes constitute a direct burden on a governmental instrumentality.

#### CONCLUSION

The decision of the circuit court of appeals is in accord with *Childers v. Beaver*, 270 U. S. 555. It is therefore respectfully submitted that the petition should be denied.

✓ CHARLES FAHY,  
*Solicitor General.*

NORMAN M. LITTELL,  
*Assistant Attorney General.*

✓ NORMAN MACDONALD,  
*Attorney.*

JANUARY 1943.

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1942

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No. 623

OKLAHOMA TAX COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA

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No. 624

OKLAHOMA TAX COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA

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No. 625

OKLAHOMA TAX COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON WRITS OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES**

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**OPINIONS BELOW**

The District Court wrote no opinion; its findings of fact and conclusions of law (R. 30-35, 75-

80, 118-122) are not reported. The opinion of the Circuit Court of Appeals (R. 126-135) is reported in 131 F. (2d) 635.

#### **JURISDICTION**

The judgments of the Circuit Court of Appeals were entered November 13, 1942 (R. 135-136). The petitions for writs of certiorari were filed January 5, 1943, and were granted February 15, 1943 (R. 137). The jurisdiction of this Court rests upon section 240(a) of the Judicial Code, as amended by the act of February 13, 1925.

#### **QUESTION PRESENTED**

Whether the various sorts of restricted property of deceased allottees of the Five Civilized Tribes are subject to Oklahoma State inheritance taxes.

#### **TREATIES AND STATUTES INVOLVED**

The applicable provisions of the treaties and statutes involved will be found in the Appendix, *infra*, pp. 101-115.

#### **STATEMENT**

These were three actions brought by the United States to recover estate and inheritance taxes imposed by the petitioner Oklahoma Tax Commission upon the transfer of the estates of three deceased members of the Five Civilized Tribes and paid under protest by the Secretary of the Interior. In each case, the District Court made findings of

fact and conclusions of law and entered judgment for petitioner (R. 30-36, 75-81, 118-123). The Circuit Court of Appeals reversed (R. 126-136).

The inheritance taxes against two of the estates (Nos. 623 and 624) were assessed pursuant to c. 162, Okla. S. L. 1915, as amended by c. 112, Okla. S. L. 1927. The inheritance tax against the third estate (No. 625) was assessed pursuant to c. 66, art. 5, Okla. S. L. 1935. Both statutes tax transfers under the laws of Oklahoma.

Each of the three cases involves the estate of an enrolled, full-blood member of the Five Civilized Tribes and each estate includes real and personal property subject to varying sorts of restriction against alienation. The particular facts of the several cases vary, and the various types of property involved are subject to different types of restrictions. In the interest of clarity, therefore, the following discussion sets out the facts and the legal status of the property with respect to each case and, subsequently, a general summary of the types of property involved.

*No. 623. Lucy.*—Lucy Bemore was a full-blood Seminole, enrolled opposite No. 1563. She died intestate December 23, 1932, leaving surviving her husband and a son who inherited her estate in equal shares. Her husband is Lewis Bemore, a quarter-blood Creek Indian; her son, Thomas, is an unenrolled full-blood Seminole (R. 31).

The Oklahoma Tax Commission fixed the net value of her estate at \$250,630.77, and assessed an

inheritance tax of \$5,925.20 (R. 32). Her estate consisted of 39.97 acres of land allotted to her as homestead; 28.07 acres of land allotted as surplus; 43 acres of land purchased for her out of restricted funds and conveyed to her by a restricted form of deed; and \$205,008.14 derived from oil and gas royalties and held by the Secretary of the Interior<sup>1</sup> (R. 18-19, 31-32).

The lands of the Seminole Nation were allotted to the individual members at the turn of the century. Acts of July 1, 1898 (30 Stat. 567), and June 2, 1900 (31 Stat. 250). Each member was to select a 40-acre tract which was to be "inalienable and nontaxable as a homestead in perpetuity" (30 Stat. 568); there was no express restriction upon the surplus lands after date of patent.

Subsequent legislation applied to each of the Five Civilized Tribes. The act of April 26, 1906 (34 Stat. 137), provided in section 19 that unrestricted lands should be taxable and that restricted lands should be tax exempt while held by the original allottee. The act of May 27, 1908 (35 Stat. 312), in section 1 restricted until April 26, 1931, the lands of living allottees<sup>2</sup>

<sup>1</sup> The stipulation and agreement of the parties refers to this sum as a "cash credit" derived from oil and gas royalties (R. 19), while Finding III of the trial court indicates that an unspecified portion of the moneys was invested in United States Treasury bonds (R. 31).

<sup>2</sup> The restrictions applied to all the lands of allottees of three-fourths or more blood and to the homesteads of those of more than one-half and less than three-fourths blood.

against "alienation, contract to sell, power of attorney, or any other incumbrance" unless the restrictions were removed by the Secretary of the Interior.<sup>2</sup> The inherited lands, under section 9 of that act, were restricted only in the hands of full-blood heirs who were forbidden to alienate without the approval of the court having jurisdiction of the estate of the allottee.<sup>4</sup> The act of May 10, 1928 (45 Stat. 495), extended the restrictions until April 26, 1956. It also provided, in section 4, that the Indian should select up to 160 acres of restricted land, which "shall remain exempt from taxation while the title remains in the Indian designated \* \* \* or in any full-blood heir or devisee of the land;"<sup>5</sup> restricted lands in excess of the designated 160 acres after April 26, 1931 "shall be subject to taxation by the State of Oklahoma \* \* \* in all respects as un-

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<sup>2</sup> Section 1 also removed all restrictions from lands owned by mixed-blood Indians having less than one-half Indian blood and by section 4 declared that all unrestricted land "shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes."

<sup>4</sup> For the purposes of this statement, the various types of restrictions will be viewed as equivalent each to the other. See *Parker v. Richard*, 250 U. S. 235; *infra*, p. 57. But if a more precise analysis should be needed, it may be noted that the restrictions take two forms: (a) a prohibition against alienation, etc., save with the approval of the Secretary, and (b) a prohibition save with the approval of the county court.

<sup>5</sup> Section 4 was amended May 24, 1928 (45 Stat. 733) for the sole purpose of changing "full blood heir of devisee" to "full blood heir or devisee."

restricted and other lands.” Section 3 of this act subjected all minerals, including the royalty interests of Indians, produced from restricted lands after April 26, 1931, to nondiscriminatory taxation.\* The act of January 27, 1933 (47 Stat. 777), provided in section 1 that where the entire interest in any restricted and tax exempt land was acquired by or for restricted Indians through inheritance, devise, gift or purchase with restricted funds, it should remain restricted and tax exempt during their lives until April 26, 1956.’

The restrictions upon the cash and bonds derived from oil and gas leases upon restricted lands are based upon consistent departmental practice, ratified by Congress and uniformly approved by the courts (see *infra*, pp. 67-70). The restrictions against alienation imposed upon living allottees by section 1 of the act of 1908 extended to the leasing of the allotted lands for oil, gas or other mineral purposes save with the approval of the Secretary of the Interior (secs. 1 and 2, act of May 27, 1908). The homestead and surplus allotments of Lucy were leased for oil and gas mining purposes during her lifetime with the approval of the Secretary (R. 18-19). The lease required that

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\* Section 3 was amended February 14, 1931 (46 Stat. 1108), and again on March 12, 1936 (49 Stat. 1160), in respects not here material.

’ A “restricted Indian” of the Five Civilized Tribes is one of one-half or more Indian blood. *Glenn v. Lewis*, 105 F. (2d) 398 (C. C. A. 10).



the royalties accruing thereunder be paid to a representative of the Secretary (R. 23). The moneys and United States bonds to the credit of the estate represent the royalties on oil and gas produced from the leasehold (R. 19). The act of January 27, 1933, provided in section 1 that all funds then or thereafter held by the Secretary of the Interior for Indians of the Five Civilized Tribes of one-half or more Indian blood were restricted and subject to the jurisdiction of the Secretary.\* Funds of this nature have by long-accepted practice been viewed as tax exempt. See *United States v. Thurston County*, 143 Fed. 287 (C. C. A. 8).

Under these statutes, all of the allotted lands were restricted and tax exempt during Lucy's life (sec. 1 of the act of May 27, 1908; sec. 19 of the act of April 26, 1906), including both the 40-acre homestead and the 28 acres of surplus lands. She designated these lands as tax exempt under section 4 of the act of May 10, 1928 (R. 37). The minerals produced after April 26, 1931, were taxable under section 3 of the act of May 10, 1928, but this act is probably unconstitutional as ap-

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\* The regulations prescribed by the Secretary of the Interior under section 2 of the act of May 27, 1908, 35 Stat. 312, and related statutes, recognize that the proceeds from oil and gas leases are restricted and require that all such money be paid to a representative of the Secretary. 25 CFR 183.18, 183.20. Similar provisions have been carried in the regulations since 1908. See sec. 20 regulations approved April 20, 1908.

plied to the homestead.<sup>9</sup> The cash and bonds held by the Secretary for Lucy's account were restricted under departmental practice and the act of May 27, 1908, and were therefore tax exempt. The 43-acre tract of purchased land was restricted but not tax exempt.<sup>10</sup>

The half-interest in her property, both real and personal, which descended to her quarter-blood husband became free of all restrictions and was thereafter taxable. The property which descended to her full-blood son remained in the same status which it had been in during Lucy's life.<sup>11</sup>

*No. 624. Nitey.*—Nitey was a full-blood Seminole, enrolled opposite No. 1446. She died August 17, 1930, and by will devised and bequeathed her estate in equal shares to her five full-blood Seminole children (R. 76).

The Oklahoma Tax Commission fixed the net value of her estate at \$677,593.58 (R. 76) and

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<sup>9</sup> The homestead lands under the act of July 1, 1898, were "nontaxable \* \* \* in perpetuity." Since the mineral taxes are probably taxes on the land, section 3 of the 1928 act would seem inapplicable at least during the life of Lucy and perhaps while the lands were held by her heirs. *Choate v. Trapp*, 224 U. S. 665; *Carpenter v. Shaw*, 280 U. S. 363; 53 I. D. 502.

<sup>10</sup> Title was taken on a restricted deed (R. 31).

<sup>11</sup> The allotted lands in his hands were restricted under section 9 of the act of May 27, 1908, and were tax exempt under the acts of July 1, 1898, and May 10, 1928. The cash and bonds remained restricted, as held for the benefit of the full-blood son. The 43-acre tract of purchased lands was restricted under section 9 of the act of May 27, 1908, but was taxable.

assessed an inheritance tax of \$16,053.74 (R. 77). Her estate consisted of 40 acres of land allotted as homestead; 200 acres allotted as surplus; United States Treasury bonds in the amount of \$203,812.50 held by the Secretary of the Interior; interest on bonds in the amount of \$881.25 likewise held by the Secretary; moneys held by the Secretary in the amount of \$513,380.22; some household goods, and a truck (R. 56, 76).

The homestead and surplus allotments of Nitey were the subject of oil and gas leases with the approval of the Secretary (R. 55), and the leases required that the royalties be paid to his representative (R. 61, 68). The cash and bonds represent these royalties (R. 55).

The same statutes which govern the restrictions of Lucy's estate in No. 623 also apply here, with the addition that the restrictions against alienation by full-blood heirs except on the approval of the court having jurisdiction of the estate, contained in section 9 of the act of May 27, 1908, were expressly extended to full-blood devisees by the amendatory act of April 12, 1926 (44 Stat. 239).

Under these statutes, all of the lands were restricted and tax exempt during the life of Nitey (sec. 1 of the act of May 27, 1908; sec. 19 of the act of April 26, 1906. The cash and United

States bonds held by the Secretary of the Interior for her benefit were restricted. The status of the remaining personal property, consisting of household goods and a truck, cannot be determined from this record. A tax exemption certificate was executed on behalf of Nitey on June 23, 1930, under the act of May 10, 1928, which designated her 40-acre homestead and 120 acres of her surplus lands as exempt (R. 49-50, 59). The remaining 80 acres of surplus lands became taxable after April 26, 1931.

In the hands of Nitey's five full-blood children, who took in equal shares under her will, the property had the same status.<sup>12</sup>

*No. 625. Wosey.*—Wosey Deere was a full-blood Creek, enrolled opposite No. 9546.<sup>13</sup> She died intestate on September 2, 1938. She left surviving her husband, Milford Thomas, a seven-eighths blood Cherokee, and three children who were full-blood Creeks, to whom her estate passed (R. 113).

The Oklahoma Tax Commission fixed the net value of her estate at \$318,794.07, and assessed an inheritance tax of \$14,908.67 (R. 119-120). Her estate consisted of 40 acres of land allotted as

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<sup>12</sup> The lands in their hands were restricted under section 9 of the act of May 27, 1908, as amended by the act of April 12, 1926.

<sup>13</sup> *Board of Commissioners v. Seber*, No. 556, this Term, now pending before this Court, involves another tax controversy with respect to the property of Wosey Deere.

homestead; 120 acres allotted as surplus; 160 acres inherited in 1915 from Sakquanny Long, a deceased full-blood Creek Indian; United States Treasury bonds held by the Secretary of the Interior in the amount of \$295,304.38; interest on the bonds held by the Secretary in the amount of \$2,458.93; moneys held by the Secretary in the amount of \$40,772.19; a four-fifths interest in 40 acres of land, the status of which is not shown by the record; a wrecked automobile; a \$500 judgment; miscellaneous items valued at \$1,511.96; and a life insurance policy for \$22,161 (R. 99-101, 118-119).

The lands of the Creek Nation were allotted to the individual members at the beginning of the century. Each member was to select a 40-acre tract as a homestead out of the 160 acres allotted to him. All lands were restricted for five years and the homestead declared to be "nontaxable, inalienable, and free from any incumbrance" for 21 years. Act of March 1, 1901 (31 Stat. 861), as amended by the supplemental agreement in the act of June 30, 1902 (32 Stat. 500). The subsequent legislation traced in No. 623, Lucy, is also applicable here.

The property in the hands of Wosey Deere had the following status: The 160 acres of allotted land, homestead and surplus, were restricted against alienation by section 1 of the act of May 27, 1908, and were tax exempt until April 26, 1931,

under section 19 of the act of April 26, 1906. Wosey Deere selected these lands as tax exempt under the act of May 10, 1928 (R. 119), and, except for mineral taxes under section 3 of that act, they were also exempt from taxation after April 26, 1931. The 160 acres inherited by Wosey Deere from Sakquanny Long in 1915 were restricted in her hands under section 9 of the act of May 27, 1908, and were taxable after April 26, 1931, because in excess of the 160 acres designated under section 4 of the act of May 10, 1928. The cash and bonds held by the Secretary for the benefit of Wosey Deere accumulated from an oil and gas lease on the 160-acre tract inherited from Sakquanny Long in 1915 (R. 100, 119) <sup>14</sup> and were restricted. The record does not disclose the status of the four-fifths interest in 40 acres, the miscellaneous items, the \$500 judgment, the wrecked automobile, or the life insurance policy.

The property which passed to Milford Thomas, the seven-eighths blood Cherokee husband, had the same status <sup>15</sup> except for the 160 acres of inherited land; this was restricted but not tax exempt in Wosey Deere's hands after 1931, and the

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<sup>14</sup> The stipulation and agreement of the parties states that the lease was made by Wosey Deere (R. 100). The lease itself (R. 108) shows that it was made by Sakquanny Long during his lifetime.

<sup>15</sup> The act of January 27, 1933, has been construed to preserve the existing restrictions on lands inherited from allottees by Indians of half-blood or more. *Glenn v. Lewis*, 105 F. (2d) 398 (C. C. A. 10).



act of January 27, 1933, is therefore inapplicable; under section 9 of the act of May 27, 1908, it passed to the mixed-blood heir free from restrictions and was taxable. The property which passed to the full-blood heirs had the same status as in the hands of Wosey Deere.<sup>16</sup>

*Summary. Nos. 623-625.*—The decedents are all full-blood allottees of the Five Civilized Tribes. Their heirs and devisees are full-blood members of the tribes, except that one husband (of Lucy) is a quarter-blood Creek and another (of Wosey) is a seven-eighths blood Cherokee.

In the argument which follows, we urge that property which is restricted at the moment of death is beyond the reach of the state inheritance or estate taxes unless Congress has expressly made it taxable. The estate of each decedent is composed primarily of property of this sort.<sup>17</sup> We do not urge that restricted prop-

<sup>16</sup> The act of January 27, 1933, has been construed not to repeal or modify the prior law permitting full-bloods to convey with county court approval. *United States v. Easley*, 33 F. Supp. 442 (E. D. Okla.). The lands were, therefore, restricted under section 9 of the act of May 27, 1908.

<sup>17</sup> (1) Lands restricted in the hands of both the decedent and heir: the allotted lands of Lucy which went to her child; the allotted lands of Nitey (80 acres of which became taxable in 1931, after her death); the 40-acre homestead and 120 acres of surplus lands of Wosey. (2) Lands restricted in the hands of the decedent but unrestricted and taxable in the hands of the heir: all the lands of Lucy which went to her husband. (3) Cash and bonds held by the Secretary subject to restrictions for the benefit of both decedent and

erty which has been made taxable by Congress is exempted under Federal statutes, although one branch of our argument would indicate that it is not covered as a matter of state law. There is some of this property in the estate of two decedents.<sup>18</sup> There are also miscellaneous items in the estates of two of the decedents the status of which cannot be determined from this record.<sup>19</sup>

#### SUMMARY OF ARGUMENT

### I

The Supreme Court of Oklahoma has never passed directly upon the reach of the state inheritance and estate taxes as applied to restricted property of members of the Five Civilized Tribes, but both the statutes and the Oklahoma decisions demonstrate that the state taxes are inapplicable.

A. The state tax statutes apply only to a transfer under state law. The taxes are made liens upon the property which passes at death.

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heir: that of Lucy which went to her child and that of Nitey and Wosey. (4) Cash and bonds held by the Secretary subject to restrictions for the benefit of the decedent but not the heir: that of Lucy which went to her husband.

<sup>18</sup> Lucy's 43 acres of purchased lands (she died before the exempting acts of June 20, 1936, 49 Stat. 1542, and May 19, 1937, 50 Stat. 188), and the 160 acres inherited by Wosey from Sakquanny Long.

<sup>19</sup> Wosey Deere's four-fifths interest in 40 acres; the household goods and truck of Nitey; the wrecked automobile, the \$500 judgment, the life insurance, and the miscellaneous items of Wosey.

In addition, the tax laws contain administrative features which serve to control the administration of decedents' estates.

B. The probate system which is applicable to the restricted property of members of the Five Civilized Tribes is rather intricate. The descent and distribution of restricted Indian property in Oklahoma has been governed successively by tribal law, adopted Arkansas statutes, tribal law, Arkansas statutes and Oklahoma statutes, but in each case the governing law has been selected by Congress as its own provision. At present, the state courts determine heirships, and administer unrestricted property, but do not have a general probate jurisdiction. They serve only as Federal agencies, so far as their decisions affect restricted property, which is not "within the jurisdiction of the probate courts of the state." *Jefferson v. Winkler*, 26 Okla. 653. The custody of restricted property remains in the Secretary of the Interior who has a discretionary power to remove restrictions and permit transfers of this property.

C. Accordingly, the state inheritance and estate statutes cannot be intended to apply to restricted property. Its transfer is not made under state law. The lien which the statutes impose is impossible of application to the restricted property, and the various provisions giving the probate courts full control over the administrator or the

executor and the decedent's property, cannot be applied. Finally, for a period of 30 years, during which there were several reenactments, the state officials made no effort to collect the tax upon the transfer of restricted property of members of the Five Civilized Tribes, and the effort to collect the tax upon Osage and Quapaw property quickly proved abortive.

## II

A. The policy of Congress as to tax exemption of Indian property has been marked by three stages. Until shortly after the Civil War, the Federal Government meticulously guarded the Indians against all forms of state taxation and control. Thereafter, until about 1930, Congress adopted a policy which looked toward the assimilation of Indians into the polity and economy of the several states and which consequently looked toward the break-up of tribal holdings and the individualization of Indian lands, with the correlative anticipation of subjecting these lands to state taxation at one point or another in the course of the Indians' holding. By 1930, it had come to be believed that this policy had proved a failure, and that state taxation was a major cause of Indian landlessness and destitution. Consequently, the years since 1930 have seen a substantial reversal in policy, looking toward increasing the group activities of the Indian and increasing the safeguards given them against state taxation.

B. The traditional instrument of Federal guardianship and Federal protection against state taxation has been the restrictions imposed upon Indian property.

(1) From a time prior to the adoption of the Constitution, and continued for many years thereafter, the United States has imposed stringent prohibitions against the transfer of Indian lands either to states or to individuals. The protection extended to involuntary transfers as well as to voluntary, and was a cardinal feature in the solemn promises given the Creeks and the Seminoles at all stages of their tribal existence. This protection survived the allotment acts in full vigor, so far as the allotted lands were continued in a restricted status. This Court has always construed the restrictions in a broad and generous spirit. So, too, have the courts of Oklahoma. The restrictions took content from the long practice of complete immunity from state control or taxation, and from the treaty promises which continued without abrogation as to the restricted lands. Not infrequently, it is true, the restrictions were accompanied by express tax exemptions, but these were necessary for protection against the territorial governments and their local subdivisions rather than the state government, which was concluded by the restrictions alone. The Oklahoma Enabling Act put the restricted lands out of the taxing jurisdiction of the state. This

Court, the Oklahoma courts, and the Federal courts in Oklahoma have uniformly recognized that express congressional permission is necessary to tax restricted lands or their transfer. The Oklahoma legislature has itself made express recognition of this. None of the taxes which might otherwise be applicable have ever been imposed with respect to restricted Indian property.

(2) The restrictions upon the funds of Indians are based historically upon the restrictions upon the lands from which those funds are derived. By long practice, judicially confirmed, the funds are held by the Secretary of the Interior and subject to his control. The act of January 27, 1933, confirms this practice. Also, by long and judicially confirmed practice the restricted funds are exempt from state taxation.

C. The inheritance and estate taxes cannot be applied to the transfer of this restricted property because they contradict the restrictions.

(1) The tax itself is inconsistent with the restrictions since they take the transfer out of the taxing jurisdiction of the state. *The Kansas Indians*, 5 Wall. 737; *The New York Indians*, 5 Wall. 761; *United States v. Rickert*, 188 U. S. 432. These decisions have never been qualified and have uniformly been followed. The result is not a product of the so-called "instrumentality" doctrine, but rests upon the operation of the statutory restrictions. If, on the balance, an estate or in-



heritance tax should be imposed with respect to restricted lands, or to some part of them, this is a decision for Congress and not for the courts to make.

(2) The lien imposed by the state taxes is in conflict with the Federal restrictions. This Court has held that, even where the lien is accompanied by a provision forbidding foreclosure during Indian occupancy, it serves to invalidate the tax statute. *The New York Indians*, 5 Wall. 761. When Congress has permitted the taxation of restricted property, it has ordinarily taken pains that no tax lien should attach. This course of discriminating legislation heavily underscores the importance that, if restricted lands are to be subjected to taxation, this be done by legislative action rather than judicial innovation. Particularly since the tax, if upheld, would apparently cast a cloud and a threat of foreclosure upon all restricted property in excess of the statutory exemptions under state law owned by Indians in Oklahoma who have died since 1915, this Court should hesitate to grant the request of the State Tax Commission that it assume the legislative responsibilities of Congress.

(3) A number of the provisions of the Oklahoma tax statutes involve a command of the decedent's property which is wholly inconsistent with the Federal duties and responsibilities of the Secretary of the Interior and his repre-

sentatives who have both the control and the custody of the restricted property.

(4) Not only the state tax officials but, with an even greater degree of consistency, the Federal officials charged with the administration of Indian affairs have construed the restrictions, ever since 1908, as serving to exempt the restricted property from state taxation upon its transfer at death. This construction has been contemporaneous, long-continued, and known to Congress, and has been followed by frequent congressional adjustments of restrictions and tax exemptions which have left this long-standing administrative construction unchanged. Upon familiar principles, it must be taken to have received specific legislative sanction.

D. Much of the property involved in these cases is not only restricted but subject to a specific tax exemption. This specific exemption was not primarily designed to protect the lands against state taxation, since that protection was taken to be given by the restrictions. However, the exemptions are there, and, at the minimum, must be given effect by this Court. They speak in broad terms: "nontaxable" and "exempt from taxation." This broad exemption covers all forms of state taxation with respect to the lands. As this Court has frequently held, Indian exemptions, in contrast to the ordinary exemption which is carved out of a general taxing statute,

are to be construed broadly and in the sense with which the Indians must have understood them. So construed, they do not fall before the rule which this Court has announced as to ordinary tax exemptions which do not include estate or inheritance taxes unless specifically mentioned.

E. There is no theory which would serve to permit the state to tax the transfer of restricted property at death. (1) The transfer at death is not a state privilege sufficient to ground an otherwise forbidden tax. (2) The rule as to Federal estate taxation is inapplicable, since the restrictions were directed not against the United States but against third persons, whether an individual or a state. And, quite apart from the intended effect of the restrictions, Article VI of the Constitution would condemn a state qualification of the restrictions while it would not forbid a Federal qualification.

F. Finally, the decision below was compelled by the decision of this Court in *Childers v. Beaver*, 270 U. S. 555. (1) The case cannot be distinguished on any valid ground, since the restricted property of the Five Civilized Tribes is, in every respect mentioned by the opinion, on the same footing as that of the Quapaws. (2) The reasoning of the *Beaver* case, however, is not entirely satisfactory. But its result is entirely correct, and its reasoning may be sustained if its few enigmatic sentences be read to refer to the effect of the Federal restrictions.

**ARGUMENT**

This case does not, except in the very broadest sense, involve a question of intergovernmental tax immunity. We deal here, not with the broad implications of the Constitution and the federated form of Government, but with the cumulative impact of much history and many statutes relating to the members of the Five Civilized Tribes and their property. In this highly specialized field, which has been the subject of a great mass of minute legislation, it could scarcely be profitable to reason from distant analogies in the general, nonstatutory tax relations between the nation and the states. In the pages which follow there will, then, be no characterization of either the Indian or his property as a "Federal instrumentality." Attention will, instead, be directed to the specific statutes and the specific practice which forms the framework within which any question of Five Civilized Tribes taxation must be answered.

An answer drawn from scores of statutes and decades of history will be neither accurate nor comprehensible unless it be understood that it represents an amalgam of both practice and theory, and that the intended effect of the statutes must be gathered from the practice and the court decisions which preceded them. This brief will discuss, in the first of its two points,

the reach of the Oklahoma tax as a matter of state law. Our second point will show that the Federal restrictions upon the property involved in these cases serve by their nature to exclude any state taxation upon its transfer. In each point we shall be forced to present to this Court a fragmentary part of the extensive and unique history which forms the foundation of any inquiry into the specialized field of Indian law. This history is advanced not as a form of scholarly digression, but as an essential, and indeed the major, ingredient in an understanding of the issues presented by these cases.

## I

### THE INHERITANCE TAX AS A MATTER OF STATE LAW IS INAPPLICABLE TO RESTRICTED PROPERTY OF A MEMBER OF THE FIVE CIVILIZED TRIBES

The Supreme Court of Oklahoma has never passed directly upon the applicability as a matter of state law of the state inheritance and estate taxes to restricted property of members of the Five Civilized Tribes. We are convinced, however, that it is so plainly inapplicable under controlling statutes and decisions that this point must be brought to the support of the judgment of the court below before we present our main contention, that the tax cannot be applied without contradiction of Federal statutes.

## A. THE STATE TAX STATUTES

1. *The taxes are laid on a transfer under state law.*—S. L. 1915, c. 162, section 1, which is applicable to the estates of Lucy Bemore and Nitey, provides:

A tax is hereby laid upon the transfer to persons or corporations of property or any interest therein or income therefrom. \* \* \*

First: By will or the intestate laws of this state \* \* \*.

The Supreme Court of Oklahoma has made it plain that the statute means just what it says, and that the tax laid by the inheritance law of 1915, as amended, is a price paid to the state for the privilege of transmitting property at death under state law. *McGannon v. State*,<sup>20</sup> 33 Okla. 145; *In re Estate of Harkness*, 83 Okla. 107; *In re Estate of Whitson*, 88 Okla. 197.

S. L. 1935, c. 66, article 5, section 1, which is applicable to the estate of Wosey Deere, provides:

A tax is hereby levied upon the transfer of the net estate of every decedent \* \* \* by will or the intestate laws of this state \* \* \*.

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<sup>20</sup> The *McGannon* case arose under the first inheritance tax of Oklahoma, S. L. 1907-08, pp. 733-48, which was similarly levied "When the transfer is by will or by the intestate laws of this State."



The 1915 act was an inheritance tax on the legacies or distributive shares of the estate, and the 1935 act is an estate tax on the estate itself. It is wholly clear that transfers under these statutes are taxed only when they are transferred by the intestate laws of Oklahoma.

2. *The taxes are made liens upon the property passing at death.*—Section 8 of the 1915 act, as amended by S. L. 1919, c. 296, section 5, provides:

Every such tax shall be and remain a lien upon the property transferred until paid, \* \* \*.

Similarly, S. L. 1935, c. 66, article 5, section 9, provides:

The taxes levied under this Act shall be and remain a lien upon all the property transferred until paid; \* \* \*.

It is to be noted that the lien subsists until the taxes are paid. It is an elementary rule that, in the absence of an express statutory provision to the contrary, statutes of limitation do not run against the state. There is no provision in either the 1915 or 1935 act for establishing any periods of limitation. The general provisions governing delinquency in the payment of taxes which have been in force during the period of applicability of the 1915 and 1935 inheritance tax laws<sup>21</sup> made

<sup>21</sup> Compiled Oklahoma Statutes, 1921, section 9724; Oklahoma Statutes, 1931, section 12723; Oklahoma Statutes Annotated, 1941, title 68, section 353.

The Uniform Tax Procedure Act enacted by Oklahoma in 1939 does provide in section 24 that no tax may be assessed,

taxes upon real property "a perpetual lien," and taxes due upon personal property, a lien for a period of two years upon the real property of the delinquent taxpayer. Whether the general provisions or those of the inheritance laws govern, then, the lien at least as to real property remains until the tax is paid. If the inheritance tax is applicable to restricted Indian property there may be existing liens upon all such property included in the restricted estate of any Indian who has died, owning property in excess of the statutory exemptions under state law, since the passage of the 1915 act.<sup>22</sup>

Sections 28 and 29 of the Uniform Tax Procedure Act, which would be applicable to the collection of the inheritance taxes involved in this case, provide respectively for the issuance of tax certificates and tax warrants by the Oklahoma Tax Commission. These instruments when enforcement proceedings for collection instituted, after three years have elapsed since filing of a return, but this section expressly declares that it shall be "operative only in cases arising after the effective date of this act," and requires, in any event, that a return be filed.

<sup>22</sup> The act of May 26, 1908, Laws 1907-08, c. 81, p. 733, which was incorporated in the Revised Laws of 1910, as sections 7489-7523, was repealed by Laws 1941, p. 462, section 1, effective June 7, 1941, but none of the subsequent inheritance tax laws have been repealed. Section 26 of the 1935 act expressly preserved prior inheritance tax laws "where the decedent died prior to the effective date of this Act," and a similar provision was included in section 22 of the 1939 act (Laws 1939, p. 435), which superseded the 1935 act.

tered by the court clerk upon the district court judgment docket initiate a process of execution against delinquent estates, and create further liens against the estates "in addition to any and all other liens existing in favor of the State."

3. *The tax laws contain provisions controlling the administration of decedents' estates.*—These provisions are based upon the assumption that the administration of the estate is subject to the jurisdiction of the county court of the State.

The legal representative of a decedent is not entitled to a final order of discharge from the county court until he produces a receipt showing the payment of the inheritance or estate tax. (Section 8 of 1915 act, as amended; section 25 of 1935 act.)

The legal representative of a decedent is further authorized to sell any property of the estate if necessary to pay the tax. (Section 10 of 1915 act, as amended; section 9 of 1935 act.)

Section 8 of the 1935 act also authorizes the legal representative to borrow money to pay the tax, and to mortgage or pledge the assets of the estate to secure the loan.

Finally, it is provided in section 10 of the 1935 act that no banking institution may deliver securities or assets of an estate to the legal representative of a decedent without notifying the Oklahoma State Tax Commission, and retaining such an amount of this property as will be sufficient to pay the tax.

## B. THE NATURE OF THE FIVE TRIBES PROBATE SYSTEM

The probate system applicable to the restricted property of members of the Five Civilized Tribes results from an intermingling of statutory provisions, judicial decisions, and years of operating practice. The resulting product is rather intricate, but an examination in some detail makes plain, we submit, that the State legislature cannot have intended that the state inheritance and estate taxes should apply.

Unless Congress has provided to the contrary, the descent and inheritance of Indian property, including lands allotted in severalty, has always been governed by tribal law. See *Jones v. Meehan*, 175 U. S. 1, 29.

As to land allotted under the General Allotment Act of February 8, 1887 (24 Stat. 388), Congress provided in section 5 that it should descend according to the law of the state in which the land was situated. The Secretary of the Interior, however, probates the allotted lands, both as a consequence of the restrictions forbidding transfer without his consent and pursuant to express statutory direction. *Taylor v. Parker*, 235 U. S. 42; act of June 25, 1910 (36 Stat. 855). His reliance upon state law, under section 5 of the General Allotment Act, is simply upon a convenient rule-book which has been provided by Congress, and "the lands really passed under a

law of the United States" and not under state law. *Childers v. Beaver*, 270 U. S. 555, 559.

The history of the Five Tribes probate system has been considerably more complicated. By the act of May 2, 1890 (26 Stat. 81, sec. 31), Congress put in force in the Indian Territory the Statutes of Arkansas contained in Mansfield's Digest of 1883, including the statutes relating to descent and distribution. This provision did not of itself serve to replace tribal law applicable to decedents of the Five Tribes, but the act of June 7, 1897 (30 Stat. 62, 83), provided that this territorial law should apply to "all persons therein, irrespective of race." For good measure, Congress by the act of June 28, 1898 (30 Stat. 495, secs. 26 and 28), also expressly terminated all the tribal laws and abolished the tribal courts. But then, in making the so-called Original Creek Agreement by the act of March 1, 1901 (31 Stat. 861), Congress revived the tribal law of descent and distribution and made it applicable to the Creek allotments. Again this provision was repealed by the act of June 30, 1902 (32 Stat. 500), confirming the Supplemental Creek Agreement, and the law of Mansfield's Digest was reinstated as the Creek law of descent and distribution, with the qualification that Creek heirs should take to the exclusion of others. Finally, by the act of April 28, 1904 (33 Stat. 573, sec. 2), it was declared that all the statutes of Arkansas theretofore put in force in the Indian

Territory should be taken to "embrace all persons and estates in said territory, whether Indian, freedmen, or otherwise."

When the State of Oklahoma, which was to be formed from the Territory of Oklahoma as well as the Indian Territory, was admitted into the Union, Congress provided in section 13 of the Enabling Act, in order to give the new state a uniform body of law, that "the laws in force in the Territory of Oklahoma as far as applicable, shall extend over and apply to said State until changed by the legislature thereof." The people of the State made the same provision in section 2 of Article 25 of their Constitution. As this Court stated, in *Jefferson v. Fink*, 247 U. S. 288, 293, when Oklahoma was admitted into the Union on November 16, 1907, "the laws of the Territory of Oklahoma relating to descent and distribution (Rev. Stats. Okla. 1903, c. 86, art. 4) became laws of the State. Thereafter Congress, by the Act of May 27, 1908, c. 199, 35 Stat. 312, § 9, recognized and treated 'the laws of descent and distribution of the State of Oklahoma' as applicable to the lands allotted to members of the Five Civilized Tribes." <sup>23</sup>

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<sup>23</sup> Until the act of May 27, 1908, the Arkansas statutes would still have governed the descent of property of members of the Five Civilized Tribes. Speaking of the section of the Enabling Act which made the law of the Territory of Oklahoma the law of the State of Oklahoma, this Court said in *Sperry Oil Co. v. Chisholm*, 264 U. S. 488, 496-7: "Mani-



The present system of probating the estates of deceased members of the Five Tribes is entirely a product of congressional legislation. In fact, the right of making wills that is possessed by full-blood members of the Five Tribes today is based upon section 23 of the act of April 26, 1906 (34 Stat. 137), as amended by section 8 of the act of May 27, 1908 (35 Stat. 312), which sanctioned the making of wills except that no will of a full-blood Indian devising real estate away from his kindred could be made without court approval. These still remain the two basic statutes relating to the property of the Five Civilized Tribes.

The state courts, however, do not function as true probate courts as to restricted property; indeed, until 1918 they could not make a determination of heirship that would be good against all the world but could only incidentally determine such a question in suits between parties over whom they had jurisdiction. *State v. Huser*, 76 Okla. 130; *State v. Wilcox*, 75 Okla. 158. However, by the act of June 14, 1918 (40 Stat. 606), provision was made for a conclusive determina-

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festly this provision related only to the statutes affecting the citizens of the state generally and was not intended to authorize the application of such laws in contravention of the acts passed by Congress in reference to the property of Indians under the power expressly reserved in the Enabling Act itself." See also, *Jackson v. Harris*, 43 F. (2d) 513, 516 (C. C. A. 10).

tion of heirship by the probate courts of Oklahoma upon the death of restricted members of the Five Tribes.

This act made the heirship determination binding but by no means conferred a general probate jurisdiction. A proceeding under the 1918 act does not try and determine title, nor do the assets of the estate pass to the administrator, nor can they be sold to meet the debts of the decedent; the only jurisdiction of the court is to establish the fact of heirship. *Cowokochee v. Chapman et al.*, 90 Okla. 121, cert. den. 263 U. S. 713, error dismissed 267 U. S. 572; *Wolf et al. v. Gills*, 96 Okla. 6; *Eastern Oil Co. v. Harjo*, 57 Okla. 676; *Redwine v. Ansley*, 32 Okla. 317; *Anderson v. Peck*, 53 F. (2d) 257 (C. C. A. 10); *Darks v. Ickes*, 69 F. (2d) 231 (App. D. C.); *Pfister v. Johnson et al.*, 13 Fed. Supp. 662 (N. D. Okla.). Despite the 1918 act the Federal district courts in Oklahoma retain concurrent jurisdiction to determine heirs. *McDougal v. Black Panther Oil and Gas Co.*, 273 Fed. 113 (C. C. A. 8); *Anderson v. Peck*, *supra*.

It has often been held that the Oklahoma courts act as Federal administrative agencies in determining the heirs of members of the Five Civilized Tribes. *State v. Wilcox*, 75 Okla. 158; *State v. Huser*, 76 Okla. 130; *Homer v. Lester*, 95 Okla. 284; *In re Fulsom's Estate*, 141 Okla. 300; *March v. Peter*, 179 Okla. 207; *In re Jessie's Heirs*, 259

Fed. 694 (E. D. Okla.). The Supreme Court of Oklahoma, indeed, has held that, as long as lands of the Five Tribes are restricted, they are not "within the jurisdiction of the probate courts of the state." *Jefferson v. Winkler*, 26 Okla. 653. In *Letts v. Letts*, 73 Okla. 313, the same court declared that "the alienation of an Indian allotment being governed by the act of Congress, the right of an Indian to devise the same must be governed and controlled entirely by the act of Congress pertaining thereto \* \* \*."

Indeed, the Secretary of the Interior and the Superintendent of the Five Civilized Tribes,

"The Oklahoma courts play a similar role under section 9 of the act of May 27, 1908 (35 Stat. 312), which requires approval of conveyances of full-blood heirs by "the court having jurisdiction of the settlement of the estate of the deceased allottee." The state courts act as federal agencies in this regard. *Parker v. Richard*, 250 U. S. 235, 239; *Lasiter v. Ferguson*, 79 Okla. 200; *Haddock v. Johnson*, 80 Okla. 250; *Molone v. Wamsley*, 80 Okla. 181; *Snell v. Canard*, 95 Okla. 145, error dism. 267 U. S. 578; *Carey v. Bewley*, 101 Okla. 235; *Thompson v. Smith*, 102 Okla. 150; *Tiger v. Lozier*, 124 Okla. 260, *cert. den.*, 275 U. S. 496. The function is administrative and ministerial rather than strictly judicial in character and it is immaterial that the county court in approving a deed has not observed the procedural requirements and formalities required by Oklahoma law. *Cochran v. Blanck*, 53 Okla. 317; *Campbell v. Dick*, 157 Pac. 1062; *Homer v. Lester*, 95 Okla. 284; *Miller v. Gregory*, 132 Okla. 48; *Coats v. Riley*, 154 Okla. 291. Chapter 198 of the Oklahoma laws of 1918 regulating procedure, was held not to be mandatory, since the county court, acting as a Federal agency could not be subjected to state law. *Molone v. Wamsley*, *supra*; *Harrison v. Reed*, 97 Okla. 254; *Fisher v. Grider*, 109 Okla. 23.

despite the authority Congress has delegated to the probate courts of Oklahoma, still play a most important role in the administration of the restricted estates. Under the act of April 12, 1926 (44 Stat. 239), all papers in proceedings to determine heirs must be served upon the Superintendent, and if there is reason to suppose that the interests of a restricted Indian or his property will be adversely affected, the Government may remove the case within twenty days to the Federal District Courts. By section 8 of the act of January 27, 1933 (47 Stat. 777), the duty of representing any restricted Indian of the Five Tribes before the Oklahoma county or appellate courts was imposed upon probate attorneys appointed by the Secretary of the Interior under the act of May 27, 1908. By reason of his control of restricted property and his custody of the restricted funds of members of the Five Civilized Tribes of one-half or more Indian blood the Secretary of the Interior has ultimate control of all the financial aspects of the administration of estates of deceased members of the Five Civilized Tribes. The payment of the decedent's debts, of the costs of administration, of attorneys' fees, and the distribution of the financial assets of the estate, all require the discretionary approval of the Secretary of the Interior. Finally, the act of December 24, 1942 (Public Law 833, 77th Cong.) has conferred exclusive jurisdiction upon the Secretary of the Interior to probate

the restricted estates of deceased members of the Five Civilized Tribes when these consist entirely of funds or securities of an aggregate value not in excess of \$2,500.

The administration of the restricted estates of the members of the Five Tribes is thus of a dual character. Some functions have been delegated to the Oklahoma courts, while others have been retained by the Federal Government. The retained powers are fully as significant as the delegated, and include custody and administration of the estate and allowance of claims against the restricted property. And it is entirely clear that the Oklahoma courts, equally with the Federal officials, derive their powers only from acts of Congress and that the entire process of transfer of restricted property at death is a Federal not a state function. The state courts have frequently and emphatically recognized that the law governing the transfer and the machinery through which it is accomplished is Federal and not state.

#### C. THE TAXES ARE INAPPLICABLE UNDER STATE LAW

We shall here measure the state inheritance and estate taxes against the Five Tribes probate system and show that the state legislature could not have intended them to apply to the transfer at death of restricted property.

1. *The Transfer Is Not Under State Law.*—We have shown above that the 1915 act in its entirety,

and the 1935 act at least as to intestacy, applies only when the transfer at death is the result of, or the privilege is conferred by, state law (*supra*, pp. 24-25). We have shown that the Oklahoma courts themselves recognize that the transfer at death of restricted property of a member of the Five Tribes is outside the jurisdiction of the state and is accomplished under Federal not state-law (*supra*, pp. 32-33). It follows that the tax is inapplicable by the terms of the state statutes. It is, in this connection, immaterial that, after the transfer, the property becomes unrestricted. *Childers v. Pope*, 119 Okla. 300.

2. *The Statutory Mechanics Are Inapplicable.* It is rudimentary, as we show below (pp. 48-66) that restricted Indian property is immune from encumbrances and liens of all nature. Yet the inheritance and estate taxes involved in these cases purport to place a perpetual lien upon all transferred property to secure payment of the tax (*supra* pp. 25-27). It is unlikely in the extreme that the Oklahoma legislature would have thought its taxes, so enforced, to be applicable to restricted property which could not be included within its collection system.

This conclusion is reinforced by the numerous administrative features which have been detailed above (pp. 27-28) and which assume that the state court has full jurisdiction of the property, full control over the legal representative of the de-



cedent and full authority to sell or dispose of the decedent's property. In point of fact, neither of these conditions obtain with respect to restricted Indian property. As we have shown, the state court has no general probate jurisdiction, cannot control the restricted property, cannot control the Secretary of the Interior who has its custody, and has authority to determine only the persons who may present their claims to the Secretary (*supra*, pp. 32-35). It cannot be supposed that the state legislature intended to apply the taxes in cases where so many of the administrative provisions would be vain.

3. *The Practical Construction Has Been Confirmed.*—We discuss the administrative practice as it bears on the intention of Congress at a later point (pp. 85-87). But it is equally applicable to the Oklahoma legislature.

The first inheritance tax was enacted by the Oklahoma legislature in 1908. S. L. 1907-1908, secs. 7712-7715, pp. 733-734. For a period of 30 years the state officials made no effort to collect a tax upon the transfer at death of restricted property of members of the Five Civilized Tribes.<sup>25</sup> There was an abortive effort in 1924 to collect the inheritance tax upon the transfer

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<sup>25</sup> Even in 1934 when a determined effort was made to collect delinquent taxes in order to aid depleted state revenues (Oklahoma Tax Commission, Report 1931-1934, pp. 40-41), no effort was made to tax the transfer of this restricted property.

of Osage and Quapaw property. In 1926, this Court in *Childers v. Beaver*, 270 U. S. 555, held the tax invalid as applied to restricted Quapaw property, and the Oklahoma Supreme Court in *Childers v. Pope*, 119 Okla. 300, held it invalid as applied to restricted Osage property. Even during this 2-year period, for reasons not evident here, there was no effort to tax restricted Five Tribes property. After 1926 the state officials returned to their former practice of not assessing taxes upon the transfer of any restricted property.<sup>26</sup>

On May 6, 1938, special counsel for the State of Oklahoma,<sup>27</sup> appeared before the Senate Committee on Indian Affairs, holding hearings on S. Res. 168, 75th Cong., 3d sess., authorizing an investigation of the alleged loss of state revenues because of Indian tax exemptions. He said (p. 10):

Incidentally, I wish to call your attention to the fact that inheritances of restricted Indian estates are likewise exempt from the State inheritance or estates tax.

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<sup>26</sup> Some time in 1938 the state tax officials, in reflection of the view of the Federal tax officials that the Federal estate tax is applicable to restricted property, commenced the present effort to collect the state tax. We show below (pp. 93-95) that the Federal tax stands on a quite different basis.

<sup>27</sup> He was Clifford W. King, for 12 years Assistant Attorney General in charge of tax litigation, and for 5 years attorney for the Oklahoma Tax Commission. Hearings, p. 4.

The Oklahoma inheritance or estate taxes have been enacted in 1908, 1915, and 1935. Both in 1915 and in 1935 there was a settled practice and understanding that the taxes were inapplicable to restricted Indian property. Yet on neither occasion did the state legislature revise the language to impose the tax on such property. On familiar principles, the reenactment must be taken to be a legislative recognition and acceptance of the administrative practice.<sup>28</sup> *Taft v. Commissioner*, 304 U. S. 351, 357; *Great Northern Ry. Co. v. United States*, 315 U. S. 262, 275-276.

In 1935, it is true, the reenactment followed, by 10 years, an unsuccessful attempt to impose the tax on Quapaw and Osage property, which had failed because of judicial decisions which held or implied that there was a want of power in the state to impose the tax. *Childers v. Beaver*, 270 U. S. 555; *Childers v. Pope*, 119 Okla. 300. But this, even if the Court were to overrule those decisions, does not weaken the force of the reenactment. (a) The 1915 reenactment has no such qualification of its weight. (b) The legislature, by retaining the requirement that the taxable property pass under state law and the inapplicable administrative features, has accepted or at

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<sup>28</sup> We see no reason why the "reenactment doctrine" is not as fully applicable to a state legislature as to Congress. *Cf. Copper Queen Consolidated Mining Co. v. Territorial Board of Equalization*, 206 U. S. 474.

least has not afforded a challenge to the constitutional doctrine. See *Parker v. Motor Boat Sales*, 314 U. S. 244, 250; cf. *Davis v. Department of Labor and Industries*, No. 86, this Term.

## II

### THE STATE IS WITHOUT POWER TO IMPOSE A TAX UPON THE TRANSFER OF RESTRICTED PROPERTY OF MEMBERS OF THE FIVE CIVILIZED TRIBES

We urge in this point that the restrictions imposed by Federal law upon the transfer of restricted property of the members of the Five Civilized Tribes forbid the imposition of the state inheritance and estate taxes. The nature and the scope of Federal restrictions upon Indian property are matters which have, in most aspects, long since been settled by the decisions of this Court. But those decisions cannot easily be understood, and the scope of the statutes cannot easily be grasped, unless placed in the context of the somewhat specialized field of Indian law. The following pages, therefore, discuss (a) the historical policy of Congress with reference to Indian tax exemptions, (b) the scope of the restrictions upon the transfer of property, and (c) their operation to condemn the inheritance and estate taxes presented in these cases. There follows a briefer discussion of (d) the statutory tax exemptions found in these cases, (e) two collateral arguments which the state might advance in order to

justify the tax, and (f) the decision of this Court in *Childers v. Beaver*, 275 U. S. 555.

#### A. THE POLICY OF CONGRESS AS TO INDIAN TAX EXEMPTIONS

The Congressional attitude towards Indian tax exemption may be roughly marked by three stages.

Down to the Civil War and for a few years thereafter, the Federal Government meticulously guarded the Indians against all forms of state taxation. This was not a one-sided policy. Instead of attempting the impossible task of determining where the balance of advantage lay in the contributions made by the Indians to the states and vice versa, Congress adopted the policy that, generally speaking, the states would receive free such Indian lands as they needed, and that the Indians would receive free such governmental services as they needed. In both cases the Federal Government paid the bill. This policy, buttressed by the plighted word of the United States in hundreds of treaties, was given an entirely sympathetic application by the courts.<sup>29</sup>

After the Civil War, however, and particularly with the General Allotment Act of 1887, Congress

<sup>29</sup> *Kansas Indians*, 5 Wall. 737; *New York Indians*, 5 Wall. 761; *United States v. Rickert*, 188 U. S. 432; *United States v. Thurston County*, 143 Fed. 287 (C. C. A. 8); *Dewey County, S. D. v. United States*, 26 F. (2d) 434 (C. C. A. 8), cert. den., 278 U. S. 649. And cf. *New Jersey v. Wilson*, 7 Cranch 164.

embraced a contrary policy, a policy which had as its object the individualization of Indian lands and the assimilation of Indian land tenures and political relationships to those of the Indians' white neighbors. An essential element of this policy was the subjecting of Indian lands to state taxation. Much of the legislation enacted by Congress from 1887 to 1928 is directed to the subjecting of Indian lands to state control and state taxes.<sup>30</sup> Sympathy with this policy is shown in a number of Supreme Court decisions, and most notably in Justice Brandeis' opinion in *McCurdy v. United States*, 246 U. S. 263, 269, rendered in 1918, when this policy stood unchallenged.

After 50 years of trial, however, there was a general consensus that the policy of subjecting Indians and their lands to state control had proved a failure.<sup>31</sup> Two-thirds of the lands possessed by Indians in 1887 had slipped out of Indian ownership. State taxation had proved a major cause of Indian landlessness, whether operating directly through tax sales or indirectly through the compulsion by which the need to meet tax payments led to mortgage and sale of the taxed land.<sup>32</sup> An

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<sup>30</sup> See Cohen, *Handbook of Federal Indian Law*, 78-83.

<sup>31</sup> *Op. cit.*, p. 84. And see the series of hearings before the Subcommittee of the Senate Committee on Indian Affairs, beginning Nov. 12, 1928 (70th Cong., 2d sess), and extending down to the enactment of the act of June 18, 1934, 38 Stat. 984.

<sup>32</sup> *Ibid.* And see Meriam, *The Problem of Indian Administration* (1928), 477; Debo, *And Still the Waters Run* (1940).



increasing number of Indians, traditionally and economically dependent upon the land but rendered landless by the new policy, constituted an economic burden upon their neighbors and a stigma upon the national honor. Recognizing these evils, Congress, at the beginning of the last decade adopted a policy, which it has from time to time developed and strengthened, of increasing the exemptions and safeguards given to Indians against state taxation. The first statute in more than half a century which extended exemptions to property theretofore taxable is the act of March 2, 1931, 46 Stat. 1471, providing that where non-taxable land of a restricted Indian of the Five Civilized Tribes is sold, the Secretary of the Interior may reinvest the proceeds in other land, which also will be nontaxable and restricted from alienation. At least half a dozen subsequent statutes have expanded the field of Indian tax exemption.<sup>23</sup> This trend is particularly notable at a time when the general policy of Congress outside the Indian field was to decrease and eliminate tax exemption.

The new policy chosen by Congress was not the result of accident; it represented the fruit of careful deliberation. A series of Congressional investigations was carried out on the problem of Indian taxation. In 1933 the following con-

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<sup>23</sup> The act of June 30, 1932, extends the provisions of the act of March 2, 1931, to all Indians. The act of Jan. 27, 1933, 47 Stat. 777, provided for tax exemption of lands ac-

clusions were presented, which have since been generally accepted and carried out by Congress:

\* \* \* As hereinafter indicated in this report, the subcommittee is unanimous in its opinion that the Indian is not yet ready to bear the burden of taxation which is normally borne by the citizens of the Republic, and this view is supported by all the testimony and information received by the subcommittee. Inasmuch as the Indian land bears no tax revenue and in many areas will not for an indefinite time in the future contribute to the cost of government it becomes imperative for the Federal Government to perform its duty by assuming its full responsibility in educating the Indian children. The subcommittee concurs in the views expressed by certain witnesses who testified at the hearing that the duty of preparing the Indian population for citizenship is a national responsibility and that it ought not to be imposed upon

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quired "by inheritance, devise, gift, or purchase, with restricted funds, by or for restricted Indians" of the Five Civilized Tribes where the lands were theretofore tax-exempt. The act of June 18, 1934, 48 Stat. 984, extended in this respect to Oklahoma by the act of June 26, 1936, 49 Stat. 1967, provides for tax exemption of Indian lands formerly subject to taxation where such lands are conveyed to the United States to be held in trust for Indians. The act of June 20, 1936, 49 Stat. 1542, as amended by the act of May 19, 1937, 50 Stat. 188, likewise provides for the removal of Indian lands in specified amounts from local tax rolls. There have also been a number of statutes appropriating money in aid of Indians who have been compelled to pay state taxes.

the counties and local school districts charged with the operation of the local public schools. Incidentally, the subcommittee believes that many of the problems of Indian education will be solved almost instantly if the subordinate political organizations, who are now dealing direct with the Indians, are given to understand that their efforts are appreciated and that the Government of the United States will cooperate in a substantial way by paying the entire out-of-pocket cost of preparing the Indians for citizenship. Nothing else will so quickly silence the demand for the right to tax the Indians' land. ["Tax exempt Indian Lands," Report of the Subcommittee of the Senate Committee on Indian Affairs, 72d Cong., 2d sess., February, 1933, p. 11.]

Thus, instead of seeking to abolish or curtail Indian tax exemptions, the proposal was made that the local governments adversely affected by such tax exemptions should receive adequate compensation in the form of federal grants. In accordance with the recommendations of the Senate subcommittee (*op. cit.*, pp. 22-23), the Johnson-O'Malley Act of April 16, 1934 (48 Stat. 596), amended by act of June 4, 1936 (49 Stat. 1458, 25 U. S. C., secs. 452-456), laid a framework for Federal contributions towards state services rendered to Indians, and a series of specific statutes authorized concrete contributions to local authorities, by way of

compensation for services rendered to tax-exempt Indians.<sup>44</sup> Federal appropriations are now used to a considerable extent to compensate local authorities for governmental services rendered to non-tax-paying Indians.<sup>45</sup> At the same time the Federal Government has been empowered by recent legislation to secure reimbursement from the Indians benefited by services rendered.<sup>46</sup> Thus the present policy of Congress is to compel the states to look to the Federal Government for compensation for governmental services rendered to Indians with tax-exempt property, and to retain under Federal control the levying of such charges as may seem proper against these Indians.

It may be noted that the shifting policies of Congress on the subject of state taxation have roughly corresponded to three stages in the general Fed-

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<sup>44</sup> See, Cohen, *Handbook of Federal Indian Law*, p. 241, and, especially, the numerous statutes of this type cited in footnote 46.

<sup>45</sup> The computations of the Oklahoma tax officials indicate that the exemptions of restricted lands from ad valorem taxation have deprived the state and its counties of tax revenues which amounted to \$4,482,938 in 1908 and had declined to \$593,904 in 1937. Hearings on S. Res. 168, 75th Cong., 3d sess., p. 30. In contrast, the United States paid, in the fiscal year 1942, \$472,351 directly to Oklahoma and its subdivisions for Indian health and education and, in addition, made expenditures of \$1,917,959 for Indian health and education in Oklahoma, a total of \$2,390,310, under authority of the Interior Department Appropriation Act for 1942 (55 Stat. 303, 320-324).

<sup>46</sup> Act of May 9, 1938, sec. 1, 52 Stat. 312, 313; act of May 10, 1939, sec. 1, 53 Stat. 707, 708; act of June 18, 1940, sec. 1, 54 Stat. 427; act of June 28, 1941, sec. 1, 55 Stat. 325; act of July 2, 1942, sec. 1, 56 Stat. 525; 25 U. S. C. A. 561, 562.

eral policy towards the relations of tribal Indians to the states: the original policy of respect for tribal autonomy, which extended throughout the treaty period, ending in 1871; the subsequent policy of suppressing tribal governments and tribal institutions and subjecting Indians to state control; and, finally, the policy which has prevailed since the beginning of the past decade, of encouraging tribal government, preventing the further individualization of tribal estates and limiting state control over Indian property.<sup>37</sup> Under the present policy of Congress many Indian tribes and communities, including portions of the original Creek Nation, have reestablished local governments, many of which are now exercising powers of taxation over their members.<sup>38</sup>

<sup>37</sup> Discretionary authority to extend periods of restriction had been conferred upon the President by the act of June 21, 1906, 34 Stat. 325, 326, 25 U. S. C., sec. 391. Restrictions were extended generally "until otherwise provided by Congress" by section 2 of the act of June 18, 1934, 48 Stat. 984, 25 U. S. C., sec. 462. The acts of February 26, 1927, 44 Stat. 1247, and February 21, 1931, 46 Stat. 1205, authorized the cancelation of fee patents issued without Indian consent, thus effecting a restoration of restricted status. The allotment of tribal lands was forbidden by section 1 of the 1934 act (25 U. S. C., sec. 461), but in fact allotment had been abandoned, administratively, some years earlier. The same act makes provision for the reestablishment and protection of tribal property and tribal powers. (25 U. S. C., secs. 477-478.) These latter provisions were originally inapplicable to Oklahoma tribes (25 U. S. C., sec. 473), but were substantially extended to such tribes by section 3 of the act of June 26, 1936, 49 Stat. 1967, 25 U. S. C., sec. 503.

<sup>38</sup> See Cohen, *op. cit.* 129; 455, 271, 142-143.

## B. THE NATURE OF THE FEDERAL RESTRICTIONS

1. *The Origin and Function of Restrictions on Indian Lands.*—The significance of current restrictions on the transfer of Indian property may be illuminated by a brief glance at the historical development of such restrictions.<sup>39</sup> As Chief Justice Marshall pointed out, with a wealth of learning, in *Johnson v. McIntosh*, 8 Wheat. 543, and *Worcester v. Georgia*, 6 Pet. 515, each of the great European powers establishing settlements in the New World claimed an exclusive right, even as against its own citizens, to acquire land from the Indians in possession. These claims, validated by the sword and by international agreement, were written into the statutes and royal decrees of Great Britain and Spain long before the birth of this Nation.<sup>40</sup> The treaties of the United States followed and strengthened these precedents.<sup>41</sup>

The first Indian Trade and Intercourse Act, the act of July 22, 1790 (1 Stat. 137), established

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<sup>39</sup> The term "restricted land" is, strictly speaking, a misnomer. Restrictions do not attach to the land itself nor even to the Indian owners as such; rather, they attach to the transfer of land, whether that transfer be accomplished by voluntary act of the owner or in some other fashion.

<sup>40</sup> See *Johnson v. McIntosh*, 8 Wheat. 543, 587-589; *Worcester v. Georgia*, 6 Pet. 515, 543-545; *Chouteau v. Molony*, 16 How. 203, 239.

<sup>41</sup> The first treaty ratified by the United States after the adoption of the Constitution, the treaty of January 9, 1789,



the complete and exclusive control of the Federal Government over the purchase of Indian lands, individual as well as tribal. In 1793 the language of the statute was broadened so as to make it clear that Federal control restrained grants to States as well as private purchases.<sup>42</sup> In 1796 the language of the statutory restriction on Indian land conveyances was further broadened to cover "purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto", and this restriction has remained as the keystone of Indian land law to this day (25 U. S. C. sec. 177).<sup>43</sup>

with the "Wiandot, Delaware, Ottawa, Chippewa, Pottawatomia, and Sac Nations" (7 Stat. 28), expressly declared that, "the said Nations, or either of them, shall not be at liberty to sell or dispose of the same [lands], or any part thereof, to any sovereign power, except the United States; nor to the subjects or citizens of any other sovereign power, nor to the subjects or citizens of the United States." (Art. 3.) The restriction thus imposed upon the transfer of Indian lands appears in one form or another in many other treaties, including some entered into prior to the adoption of the Constitution. See *Handbook of Federal Indian Law*, p. 41. In substance, it appears also in Article 2 of the treaty of August 7, 1790 (7 Stat. 35), with the Creek Nation (including the "Seminolies," then regarded as part of the Creek Nation): "The said Creek Nation will not hold any treaty with an individual State or with individuals of any State."

<sup>42</sup> Indian Trade and Intercourse Act of March 1, 1793, sec. 8, 1 Stat. 329, 330.

<sup>43</sup> Indian Trade and Intercourse Act of March 3, 1799, sec. 12, 1 Stat. 743.

The protection thus afforded was broadly conceived and broadly applied." It did not depend upon the character of the title and applied equally where land was held in fee simple as where held by the United States in trust for Indian beneficiaries.<sup>45</sup> It extended to involuntary land transfers as well as to voluntary transfers.<sup>46</sup> It extended to transfers or trespasses ordered by State courts or other State officials as well as to those

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<sup>45</sup> Until 1834 alienation of individual Indian lands could be effected only by treaty, under the Indian Intercourse Acts. Thereafter alienation of such lands was controlled by special and general allotment acts. Commenting on the policy involved, the court declared, in *Goodell v. Jackson*, 20 Johns. 693:

"Thus, in the resolution of congress of *January, 1776*, regulating trade with the *Indians*, it was declared, that no person should be permitted to trade with them without license, and that the traders should take no unjust advantage of *their distress and intemperance*. In a speech, on behalf of Congress, to the six nations, in *April 1776*, it was said to them, that congress were determined to cultivate peace and friendship with them, and prevent the white people from *wronging them in any manner, or taking their lands*. That congress wished to afford protection to all their brothers the *Indians*, who lived with them on this great island, and that the white people should not be suffered, by *force or fraud*, to *deprive them of any of their lands*. And in *November, 1779*, when congress were discussing the conditions of peace to be allowed to the six nations, they resolved, that one condition should be, that no land should be sold or ceded *by any of the said Indians*, either as *individuals*, or as a nation, unless by consent of congress (p. 723)."

<sup>45</sup> *United States v. Candelaria*, 271 U. S. 432.

<sup>46</sup> *The Kansas Indians*, *supra*; *The New York Indians*, *supra*. Accord: *Mullen v. Simmons*, 234 U. S. 182 (allotment); *Goudy v. Meath*, 203 U. S. 146 (allotment).

of a private character." It extended to tax sales and tax liens as well as to other attempted interferences by State governments with the exclusive control of the Federal Government over the subject of Indian land transfers.<sup>48</sup> Indeed, as a matter of historical fact, the Indians were very much more concerned about the attempts of State officials to interfere with the possession and transfer of their lands than they were with the efforts of private individuals to stimulate voluntary land transfers. For typically private individuals entering upon Indian lands were "out of the protection of the United States" and the tribes concerned were authorized, by a series of treaties, to "punish him or them in such manner as they see fit."<sup>49</sup> Officials of the States, however, could be treated with disrespect only at the risk of war.<sup>50</sup>

The fact that restrictions against land transfer were drafted primarily to protect the Indians

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<sup>48</sup> *Worcester v. Georgia*, *supra*; *The Kansas Indians*, *supra*; *The New York Indians*, *supra*; 1 Op. Atty. Gen. 465.

<sup>49</sup> *The Kansas Indians*, *supra*; *The New York Indians*, *supra*. Accord: *United States v. Rickert*, 188 U. S. 432 (allotment).

<sup>50</sup> See Article 9 of the treaty of January 9, 1789 (7 Stat. 28, 30), and other treaties to the same effect cited in *Handbook of Federal Indian Law*, at p. 6, footnote 48.

<sup>51</sup> War between the Creek Nation and the State of Georgia existed in 1789. President Washington requested the advice of the Senate as to whether the United States should issue an ultimatum requiring the Creek Nation to cede lands to Georgia. The Senate advised against such action. The two Creek Treaties of 1790 were then executed. See Cohen, *op. cit.* 50.

from state officials stands out with particular clarity in the history of the Creek and Seminole Indians. This exclusive control of property relations by the Federal Government is expressed or implied in twenty-four treaties,<sup>61</sup> made in the period from 1790 to 1866, the force of most of which has never been abrogated. It was assured by the terms of the first treaty between the United States and the Creek Nation (then including the Seminoles) in 1790 (*supra*, p. 49). But despite this agreement the states in which the Creek lands were situated defied Federal authority and attempted to subject Creek property to state control. After years of inadequate protection against unconstitutional infringements upon its

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<sup>61</sup> Twenty treaties were made with the Creek Nation, many of which include the Seminoles. Treaty of August 7, 1790, 7 Stat. 35; unpublished Treaty of August 7, 1790, Archives No. 17; Treaty of June 29, 1796, 7 Stat. 56; Treaty of June 16, 1802, 7 Stat. 68; Treaty of November 14, 1805, 7 Stat. 96; Treaty of August 9, 1814, 7 Stat. 120; Treaty of January 22, 1818, 7 Stat. 171; Treaty of January 8, 1821, 7 Stat. 215; Treaty of January 8, 1821, 7 Stat. 217; Treaty of February 12, 1825, 7 Stat. 237; Treaty of January 24, 1826, 7 Stat. 286; Treaty of March 31, 1826, 7 Stat. 289; Treaty of November 15, 1827, 7 Stat. 307; Treaty of March 24, 1832, 7 Stat. 366; Treaty of February 14, 1833, 7 Stat. 417; Treaty of November 23, 1838, 7 Stat. 574; Treaty of January 4, 1845, 9 Stat. 821; Treaty of June 13, 1854, 11 Stat. 599; Treaty of August 7, 1856, 11 Stat. 699; Treaty of June 14, 1866, 14 Stat. 785. Four additional separate treaties were made with the Seminoles. Treaty of May 9, 1832, 7 Stat. 368; Treaty of March 28, 1833, 7 Stat. 423; Treaty of June 18, 1833, 7 Stat. 427; Treaty of March 21, 1866, 14 Stat. 755.

powers,<sup>52</sup> the Federal Government proposed migration west of the Mississippi where the Indians would never be subject to the control of any state.

By the act of May 28, 1830 (4 Stat. 411), Congress authorized the President to pledge the faith of the United States that the lands granted to the migrating tribes (including the Creeks and Seminoles) would be secured to them forever.<sup>53</sup> The Creeks were skeptical as to whether the United States would afford in the West the protection it had not given in the East and their chiefs memorialized Congress in 1832 in these words (H. Doc. No. 102, 22d Cong., 1st sess., p. 3):

We are assured that, beyond the Mississippi, we shall be exempted from further exaction; that no State authority can there reach us; that we shall be secure and happy in these distant abodes. Can we obtain, or can our white brethren give assurance more distinct and positive, than those we have already received and trusted? Can their power exempt us from intrusion in our promised borders, if they are incompetent to our protection where we are?

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<sup>52</sup> It may be noted that the decree of this Court in *Worcester v. Georgia*, 6 Pet. 515, was never carried out by the State of Georgia. See *Handbook of Federal Indian Law* 123.

<sup>53</sup> This pledge took the form of patents issued to the Creeks on August 7, 1852, and to the Seminoles on August 28, 1856. (See H. R. Rept. No. 593, 55th Cong., 2d sess., p. 2.)

It is against this background that we must read the Treaty of March 24, 1832 (7 Stat. 366), which in Article XIV provided:

The Creek country west of the Mississippi shall be solemnly guaranteed to the Creek Indians, nor shall any State or Territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves, so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them.

Many years after the removal had been accomplished, a new treaty with the Creeks and the Seminoles reaffirmed this basic guaranty. Article IV of the Treaty of August 7, 1856 (11 Stat. 699). When the treaties were renegotiated after the Civil War there was no qualification of this broad freedom from state control.<sup>54</sup> The Curtis Act (30 Stat. 495) and the acts embodying the allotment agreements (act of July 1, 1898, 30 Stat. 567; March 1, 1901, 31 Stat. 861; June 30, 1902, 32 Stat. 500) made sweeping alterations in the relations between the tribes and the white

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<sup>54</sup> The Seminole Treaty of March 21, 1866, 14 Stat. 755, in Article IX, reaffirmed all prior treaty obligations; while Article XI declared that inconsistent provisions of prior treaties were annulled, nothing in the 1866 treaty was inconsistent with freedom from state control. Article VII agreed to Federal, not state, control. The Creek Treaty of June 14, 1866, 14 Stat. 785, was to the same effect; See Articles X, XII, XIV.

governments. But even here they were careful to provide that nothing should affect existing treaties except so far as they were inconsistent (30 Stat. at 569; 31 Stat. at 872; see 32 Stat. at 505).

The issue, then, becomes an inquiry into the extent to which these treaty promises have survived the break-up of tribal lands and their allotment in severalty.

The theory of the allotment acts, and notably the General Allotment Act (24 Stat. 388), was that the Indian would receive in exchange for an undivided interest in tribal lands a definite parcel of such lands, but that until he reached an advanced state of financial competence (an event generally thought likely to occur after 25 years) the land allotted to him would be restricted just as it had been prior to allotment. The Indian surrendered tribal land, protected, then as now, against all forms of state taxation as well as against all other forms of encumbrance and alienation. What he received in exchange was to have the same measure of protection, at least for a temporary period.

These promises of protection have always been construed by this Court in a broad and generous spirit. The United States is capable of maintaining suits to set aside conveyances by Indian allottees in disregard of the restrictions. *Tiger v. Western Investment Co.*, 221 U. S. 286; *Heckman v. United States*, 224 U. S. 413; *United States*



v. *New Orleans Pacific Ry. Co.*, 248 U. S. 507; *United States v. Osage County*, 251 U. S. 128; *United States v. Candelaria*, 271 U. S. 432. It is not concluded in such a suit by a prior judgment between the parties. *Privett v. United States*, 256 U. S. 201. No rule of property will avail to defeat the restrictions. *Gannon v. Johnston*, 243 U. S. 108. The restrictions extend to every form of alienation, involuntary as well as voluntary. *Goudy v. Meath*, 203 U. S. 146. The restrictions extend to lease and mortgage as well as sale. *Mullen v. Simmons*, 234 U. S. 192; *United States v. First National Bank of Yakima, Washington*, 282 Fed. 330 (E. D. Wash.) The good faith of a purchaser from an Indian allottee makes no difference. *United States v. Brown*, 8 F. (2d) 564 (C. C. A. 8), *cert. den.*, 270 U. S. 644. He is not even entitled to the return of the consideration as a condition to the cancelation of the deed at the suit of the United States. *Heckman v. United States*, *supra*; *United States v. Walters*, 17 F. (2) 116 (D. Minn.). The restriction against alienation extends to disposition by will. *Taylor v. Parker*, 235 U. S. 42.<sup>55</sup>

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<sup>55</sup> The element of Federal guardianship in the maintenance of the restrictions is indicated by the decisions which have held that Congress may extend the periods of restriction, and even reimpose them after they have expired. *Tiger v. Western Investment Co.*, 221 U. S. 286; *Brader v. James*, 246 U. S. 88; *Talley v. Burgess*, 246 U. S. 104. It is found, too, in the repeated holdings that the grant of citizenship to

When the lands of the Five Tribes came to be allotted in severalty, the use of restrictions was a well-settled policy. The restrictions applied to the Five Tribes land did not differ in the slightest from the restrictions applicable to other Indians in respect of either their absolute character or the importance of the element of Federal guardianship. It is true that the device used was not the so-called "trust patent" of the General Allotment Act but was instead a grant in fee subject to restrictions. But there are no differences of substance between the two forms of tenure that in any way affect the obligation of guardianship assumed by the United States. In practical administration, and in the decisions of this Court, "trust" and "restricted" lands have been interchangeable terms. See *United States v. Bowling*, 256 U. S. 484, 487; *Minnesota v. United States*, 305 U. S. 382, 386. Accordingly, as the Oklahoma courts themselves have recognized, the full and established scope of the traditional protections were adopted by the Five Tribes restrictions.<sup>56</sup>

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allottees has not in any way detracted from the force of the restrictions. *Tiger v. Western Investment Co.*, *supra*; *Heckman v. United States*, *supra*; *Bowling v. United States*, 233 U. S. 528; *United States v. Noble*, 237 U. S. 74; *Brader v. James*, *supra*.

<sup>56</sup> In *Smith v. Williams*, 78 Okla. 297, the court said: "From the beginning, it has been the settled policy of this court, and also of the Federal courts, in determining the validity of deeds to restricted Indian lands, to look to the acts of Congress alone." That restricted lands are under

One other fact must be realized if the restrictions imposed at the time of the allotment are to be understood. There was at that time no State of Oklahoma. The references to tax exemption referred primarily to town or territorial taxes that might be imposed by Congress or by local authorities established by Congress. It is important to stress this point because otherwise the fact that some statutory provisions refer to tax exemption and others to restraints on alienation might be read as implying that neither concept had any necessary relation to the other.<sup>57</sup> The fact is that Federal restrictions, which were not limited to voluntary sale but covered all forms of transfer or encumbrance of Indian lands, imposed as insuperable a barrier to state taxation as to private sale.

These Federal restrictions did not, however, present any barrier to Federal taxation. This the exclusive jurisdiction of Congress has also been recognized in many other decisions of that court. *Walker v. Brown*, 43 Okla. 144; *Cornelius v. Yarbrough*, 44 Okla. 375; *Wilson v. Greer*, 50 Okla. 387; *Molone v. Wamsley*, 80 Okla. 181; *Collins Investment Co. v. Beard*, 46 Okla. 310; *Choctaw Lumber Co. v. Coleman*, 58 Okla. 377. The Oklahoma courts have held, too, that so far as the transfers are approved by a state court (with respect to heirs of allottees), the courts act as Federal agencies and are not subject to state control (*supra*, pp. 33-34).

<sup>57</sup> A specific tax exemption in the hands of the allottee becomes a vested right which Congress cannot thereafter remove without compensation. *Choate v. Trapp*, 224 U. S. 665. To this extent the exemption, included within the restriction, differs from the larger immunity of which it is a part.

Court had held that Congress had the power to lay taxes upon Indian property within the Indian Territory. *The Cherokee Tobacco*, 11 Wall. 616. At the time of the allotment there was renewed agitation for the taxation of Indian property by local arms of the territorial government, responsible only to Congress.<sup>58</sup> It was against the background of this agitation that specific promises of tax immunity assumed importance. In later legislation specific provisions as to tax immunity are included only where the immunity or the restrictions generally are being limited or where other similar special circumstances appear.<sup>59a</sup>

The protection of Creek lands, based on exclusive Federal control over Indian land trans-

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<sup>58</sup> The townships of the Indian Territory insisted that they could establish schools and other essential public services only if permitted to tax Indian lands without restriction. See Sen. Doc. 169, 58th Cong., 2d sess. Section 31 of the act of May 2, 1890, 26 Stat. 81, 95, provided for the establishment in the Indian Territory of incorporated towns and cities with powers to assess and levy taxes for public improvements and generally to meet the expenses of local government.

<sup>59a</sup> The exemption provisions comprise three classes: (a) statutes imposing taxes in certain circumstances and preserving tax exemptions in other circumstances: act of April 26, 1906, sec. 19; act of May 10, 1928, secs. 3-4; act of January 27, 1933, sec. 1; act of June 26, 1936, sec. 1; (b) statutes defining periods of tax exemption: act of June 28, 1898, sec. 11; act of July 1, 1898; act of March 1, 1901, sec. 7, as amended by act of June 30, 1902, sec. 16; (c) statutes according tax exemption to otherwise taxable lands: act of March 2, 1931, as amended by act of June 30, 1942; act of June 18, 1934, sec. 5; act of June 20, 1936, as amended by act of May 10, 1937; act of June 26, 1936, sec. 1.

fers, which had been established or implied in a score of treaties, was four times repeated in the course of the allotments.<sup>59</sup> The Congress also took pains to see that nothing in the creation of the State of Oklahoma should qualify these promises.

Section 1 of the Oklahoma Enabling Act of June 16, 1906 (34 Stat. 267) contained provisions of unusual <sup>60</sup> vigor. It read:

*Provided*, That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would

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<sup>59</sup> The assurance of protection against all forms of encumbrance and alienation (including state taxation) was four times given to the Creek Indians. Section 11 of the Curtis Act of June 28, 1898 (30 Stat. 495); section 7 of the Agreement of March 8, 1900, ratified by act of March 1, 1901 (31 Stat. 861); section 16 of the act of June 30, 1902 (32 Stat. 500); and, finally, the deeds which were issued to each allottee reiterated the assurance.

<sup>60</sup> Compare the act of February 22, 1889, 25 Stat. 676, relating to North and South Dakota, Montana, Washington; the act of July 16, 1894, 28 Stat. 107, relating to Utah, and the provisions in sec. 25 of the very act of June 16, 1906, which related to Arizona and New Mexico.

have been competent to make if this Act had never been passed.

Section 221 of the Enabling Act provided that the constitutional convention to be called should accept the terms and conditions of the act "by ordinance irrevocable," and this step was duly taken on April 22, 1907. Following the Enabling Act, the people of the State of Oklahoma included in their constitution Article I, section 3, by which they renounced any claims to Indian lands, and Article X, section 6, by which they exempted from taxation, "such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States Government, or by Federal laws during the force and effect of such treaties or Federal laws."

This Court has frequently commented on and applied section 1 of the Enabling act. *Tiger v. Western Co.*, 221 U. S. 286, 309; *Ex parte Webb*, 225 U. S. 663, 662-683; *Ward v. Love County*, 253 U. S. 17. So, too, has the Supreme Court of Oklahoma. *Canfield v. Jack*, 78 Okla. 127, *cert. den.* 253 U. S. 493; *Molone v. Wamsley*, 80 Okla. 181; *Neal v. Travelers Insurance Co.*, 188 Okla. 131; *Gleason v. Wood*, 28 Okla. 502. As the court said in the *Gleason* case, the State is powerless to tax at all until Congress removes the exemption, "thereby bringing it within the operation of the general taxing system of the State."

This conclusion has, indeed, been made express by Congress itself.<sup>61</sup> In the act of April 17, 1937 (50 Stat. 68), permitting a gross production tax to be imposed by Oklahoma on lead and zinc produced from restricted Quapaw lands, the Congress declared:

In accordance with the uniform policy of the United States Government to hold the lands of the Quapaw Indians while restricted and the income therefrom free from State taxation of whatsoever nature, except as said immunity is expressly waived, and, in pursuance of said fixed policy, it is herein expressly provided that the waiver of tax immunity herein provided shall be in lieu of all other State taxes of whatsoever nature on said restricted lands or the income therefrom, \* \* \*

This Court has recognized that a plain authorization, which is to be strictly construed, must be found before the state may tax restricted property of members of the Five Civilized Tribes. *Carpenter v. Shaw*, 280 U. S. 363, 367-368; *Oklahoma v. Barnsdall Corp.*, 296 U. S. 521;

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<sup>61</sup> Various other expressions of Congressional understanding on the point may be cited. Thus, for example, H. Rept. 2415, 71st Cong., 3d sess., p. 1, advocating passage of what is now the act of February 14, 1931, 46 Stat. 1108, declares: "Under existing law the restricted allotted lands of Indians of the Five Civilized Tribes are tax exempt while restricted." See also S. Rept. 982, 70th Cong., 1st sess., pp. 3, 4, 5; S. Rept. 330, 65th Cong., 2d sess., p. 4.



see also *Board of Commissioners v. United States*, 308 U. S. 343, 350.

The Federal courts sitting in Oklahoma and the Oklahoma courts themselves, have uniformly announced the rule that, in the absence of express congressional authority, restricted lands are not taxable, and this irrespective of the presence or absence of a specific tax exemption.<sup>62</sup>

The Oklahoma legislature has itself recognized that the fact of restriction operates to exempt the land and its proceeds from state taxation. The act of April 2, 1925 (c. 21, S. L. 1925), in exacting a gross production tax upon minerals, made provision in section 3 for refunds "In all cases of overpayment, duplicate payment or payment made in error on account of the production being derived from restricted Indian lands and therefore exempt from taxation." And the Legislature, in a resolution (S. L. of 1931, p. 395) protesting against the extension of periods of restriction, spoke in these terms:

Whereas, the said provisions are applicable only to inherited land and will con-

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<sup>62</sup> *United States v. Bean*, 253 Fed. 1 (C. C. A. 8); *McGaughey v. Board of County Commissioners*, 45 Okla. 10; *Rider v. Helms*, 48 Okla. 610; *Kidd v. Roberts*, 43 Okla. 603; *Marcy v. Board of Commissioners*, 48 Okla. 1; *Brown v. Denny*, 52 Okla. 380; *Davenport v. Doyle*, 57 Okla. 341; *Watkins v. Howard*, 64 Okla. 166; *Wyan v. Fugate*, 149 Okla. 213; *United States v. Shock*, 187 Fed. 862 (E. D., Okla.); see *Mills, Oklahoma Indian Land Laws* (1924), sec. 313; *Op. Sol. Int. Dept.*, 49 L. D. 348.

tinue such property from the tax rolls of the state \* \* \*

Certainly from the beginning the practical understanding of the Indians, the Federal officials charged with the administration of their affairs, and State tax officials, has been that the state could impose no tax with respect to restricted lands except with the express authority of Congress.

The restricted lands have, of course, always been exempt from ad valorem taxation except so far as authorized by Congress. But the exemption goes far beyond this tax and, in actual practice and general understanding, has included every form of taxation with respect to the restricted property.

Oklahoma has had an intangible property tax since 1917. C. 264, S. L. of 1917; c. 72, S. L. of 1927; c. 66, art. 3, S. L. of 1931; c. 66, art. 4, S. L. of 1939. It has never, so far as the records of the Department of the Interior show, attempted to collect this tax with respect to restricted Indian property. The departmental regulations permit the Superintendents to pay taxes only upon unrestricted property. 25 CFR 221.32.<sup>63</sup>

Oklahoma has had a mortgage registration tax since 1913. C. 246, S. L. of 1913; c. 24, sec. 1171, Okla. Stat. Ann. During the period in which re-

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<sup>63</sup> The Commissioner's Circular No. 1849, Feb. 3, 1923, directs Superintendents not to pay state taxes on restricted personal property.

stricted Indians were permitted to make mortgage loans, so far as the records of the Department of the Interior show, no effort was made to collect this tax from them.

Oklahoma has had an income tax since 1908. C. 81, S. L. of 1907-1908: 68 Okla. Stat. Ann. p. 769. For 23 years there was no collection from restricted Indians. In 1932 the Solicitor of the Department of the Interior ruled that section 3 of the act of May 10, 1928 (45 Stat. 495), subjecting minerals "to all State and Federal taxes of every kind and character," made the income derived from minerals subject to state taxation after April 26, 1931. 53 I. D. 606. The State apparently made no effort to collect taxes upon other types of income until 1940 and then encountered a refusal by the Department to pay the taxes.<sup>64</sup>

From this history of legislation and administrative practice it seems entirely clear that it has been generally understood by all persons concerned that express congressional permission is necessary if the State of Oklahoma is to impose a tax with respect to restricted property of a member of the Five Civilized Tribes. There has been but one exception, the taxation of restricted lands which were purchased out of restricted funds. *Shaw v. Oil Corp.*, 276 U. S. 575. And even here the decision of this Court reversed an administrative

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<sup>64</sup> The question was submitted to the Attorney General, who thought it inadvisable to render an opinion, and the Superintendent was then instructed not to pay the taxes.

practice of at least 15 years " and was the occasion of four acts of Congress restoring the prior rule."

In short, these restrictions against alienation must be read against a background of treaty promises which the allotment agreements did not abrogate. The United States was still solemnly bound to the Creek Indians by a score of subsisting treaties promising that the Federal Government would protect Creek lands against all forms of alienation and that the Creeks and their lands would never be subjected to state control. In this view the content and the meaning of the restrictions imposed by Congress upon the transfer of Indian land are not to be measured by the rules of conveyancing and the rules of tax statutes. The tracts of land preserved to the Indian allottees and their Indian heirs and assigns were not simply the subjects of a gigantic series of transactions in real property. The allotments were the vestigial remainder of an Indian domain, constantly reduced in size and finally pulverized. They were the last sanctuary from state authority. They must be viewed, and have uniformly been so considered by this Court, not as a covenant introduced into a conveyance between merchants in real estate but as the last remainder of a century of treaties and promises.

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<sup>55</sup> See Brief for the United States, *Board of County Commissioners v. Seber* (No. 556, this Term), pp. 25-26.

<sup>56</sup> Act of March 2, 1931, 46 Stat. 1471; act of June 20, 1932, 47 Stat. 474; act of June 20, 1936, 49 Stat. 1542; act of May 19, 1937, 50 Stat. 188.

2. *The Origin and Functions of Restrictions on Indian Funds.*—We have spoken so far of the restrictions upon lands. The restrictions upon the cash and bonds found in these cases require separate discussion.

Sales and leases of restricted lands result in the conversion of the proceeds into trust or restricted property. Such personal property remains restricted and subject to the jurisdiction of the Secretary of the Interior, whether the lands from which the proceeds were derived were subject to alienation with the approval of the Secretary of the Interior or with the approval of the appropriate county court. *Parker v. Richard*, 250 U. S. 235; *Mott v. United States*, 283 U. S. 747, 750.<sup>67</sup> By section 1 of the act of January 27, 1933 (47 Stat. 777), a provision intended as declaratory

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<sup>67</sup> The possible exception to this rule is where the lease or sale is approved by the county court and not by the Secretary of the Interior with no requirement for payment of the proceeds to the Secretary of the Interior or his representative. See *United States v. Gypsy Oil Co.*, 10 F. (2d) 487 (C. C. A. 8). None of the three cases before this Court falls within the exception since the lease in each case was executed by the original allottee during his lifetime with the approval of the Secretary of the Interior and hence the restricted character of the proceeds therefrom is determined by the ruling of this Court in *Parker v. Richard*, *supra*, to the effect that the duty to protect the interests of the full-blood heir by supervising the collection, care, and disbursement of the royalties arising from the lease remains with the Secretary of the Interior.

and retroactive,<sup>68</sup> Congress, legislating separately with respect to the funds and securities of Indians of the Five Civilized Tribes, declared that all such funds and securities then held by or thereafter coming under the supervision of the Secretary of the Interior belonging to Indians of one-half or more Indian blood shall be restricted and subject to the jurisdiction of the Secretary of the Interior until April 26, 1956. The restricted cash and bonds held on behalf of each decedent in the case at bar were accumulated from oil and gas royalties on restricted lands. Under departmental regulations, the proceeds from mineral leases must be paid to a representative of the Secretary of the Interior. 25 CFR 183.18, 183.20.<sup>69</sup> The mechanics of the custody and restrictions are as follows: The income is paid to the Superintendent, who credits the lessor on his books and deposits the funds with either the Treasurer of the United States or individual banks.<sup>70</sup> With the decline in

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<sup>68</sup> "The first section of this act would restrict Indians of halfblood, or more, whether enrolled or unenrolled, until after April 26, 1956, and would be retroactive to April 26, 1931, to fill in the gap between the expiration of the act of May 27, 1908, and the passage of this act. The effect would be to hold in the custody of the Secretary of the Interior large sums of money and securities of Indians within the class described." (H. R. Rept. No. 1015, 72d Cong., 1st sess.)

<sup>69</sup> Similar requirements have been in the regulations since 1908. See sec. 20 of the regulations approved April 20, 1908.

<sup>70</sup> Bonds are deposited as security with the Treasurer when the funds are placed in bank deposits.

interest rates over the past decade almost all of the funds have been withdrawn from banks and are either held by the Treasurer of the United States or used to purchase Government bonds which in turn are held by the Treasurer. See act of June 24, 1938 (52 Stat. 1037). The bonds are ordinarily purchased in bulk and interest payments distributed to the credit of the individual Indians in proportion to the amounts of their money used in the purchase. The cash and the interest held by the Treasurer is paid out to the Indian in such amount as may be recommended by the appropriate official of the Department. 25 CFR, 221.2 *et seq.* The validity of these restrictions has long been settled. *Parker v. Richard*, 250 U. S. 235; *Mott v. United States*, 283 U. S. 747, 750.<sup>71</sup>

So, too, it has always been assumed that restricted funds were exempt from state and local taxation. The issue seems to have been litigated but thrice and in each case the decision, resting upon the plain implications of *United States v. Rickert*, 188 U. S. 432, was that the restricted funds were nontaxable. *United States v. Thurston County*, 143 Fed. 287 (C. C. A. 8); *United States v. Nez Perce County*, 267 Fed. 495 (D. Idaho); *United States v. Hughes*, 6 F. Supp. 972 (D. C. N. D. Okla.) (restricted funds of Osage Indians held exempt from Oklahoma taxation).

<sup>71</sup> See, also, *United States v. Hinkle*, 261 Fed. 518 (C. C. A. 8); *Hass v. United States*, 17 F. (2d) 894 (C. C. A. 8); *United States v. Thurston County*, 143 Fed. 287 (C. C. A. 8).



The restrictions upon the funds held by the Secretary, which were confirmed by the act of January 27, 1933 (47 Stat. 777), are coextensive with the restrictions upon the lands from which the funds were derived. Any doubt on this point should be eliminated by the fact that section 4 of this act applies to personal property held by trust companies the same terms traditionally applied to real property in the definition of restrictions, declaring that restricted funds under trust agreements should not "during the restriction period provided by law, be subject to alienation, or encumbrance, nor to the satisfaction of any debt or other liability of any beneficiary of such trust during the said restriction period." There was, of course, no intention to give to restricted funds held by private trust companies a greater protection against state taxation or other encumbrances than was accorded to funds held in the United States Treasury. The reference to "alienation" and "encumbrance" in section 4 of this act must be regarded as a partial definition of what is involved in the term "restricted," as that term is applied to Indian funds by section 1 of the act.

### *C. The Inheritance Tax Contradicts the Restrictions*

We urge that any state tax with respect to restricted property is in conflict with the implications of those restrictions, when construed with

the liberality which has been accorded their terms, and that in the absence of congressional authority no state can use these lands as the subject or the measure of a tax. In particular, we urge as to the inheritance and estate taxes involved in these cases that (1) the tax itself, (2) the lien of the tax, and (3) certain of its administrative features, are each contrary to the Federal restriction.

1. *The Tax.* The question whether taxation by a state is consistent with the existence of restrictions on the alienation of Indian lands arose first in the case of *The Kansas Indians*, 5 Wall. 737, where this Court analyzed the conflict in terms entirely applicable to these cases:

This treaty contained words of promise that the same care, superintendence, and protection, which had been extended over them in Ohio, should be assured to them in the country to which they were to remove, and also a *guarantee* that their lands should never be within the bounds of any State or Territory, nor themselves subject to the laws thereof. \* \* \* (p. 752).

The Indians who held separate estates were to have patents issued to them, with such guards and restrictions as Congress should deem advisable for their protection. Congress afterwards directed the lands to be patented, subject to such restrictions as the Secretary of the Interior might impose; and these lands are now held by these In-

dians, under patents, without power of alienation, except by consent of the Secretary of the Interior. (p. 753.)

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It is insisted, as the guarantees of the treaty of 1831 are not, in express words, reaffirmed in the treaty of 1854, they are, therefore, abrogated, and that the division of the Indian territory into separate estates, so changes the status of the Indians that the property of those who hold in severalty is liable to state taxation. It is conceded that those who hold in common cannot be taxed. If such are the effects of this treaty, they were evidently not in the contemplation of one of the parties to it, and it could never have been intended by the government to make a distinction in favor of the Indians who held in common, and against those who held in severalty.

\* \* \* (p. 755.)

Moreover, in the case of the Miami Indians, dealt with in the same litigation, the Court pointed out that apart from all other considerations, a provision that Miami lands were to be exempt from "levy, sale, execution, and forfeiture" was sufficient to exclude State taxation of such lands. The Court declared (p. 761):

The position, it seems to us, is too plain for argument. The object of the treaty was to hedge the lands around with guards and restrictions, so as to preserve them for the

permanent homes of the Indians. In order to accomplish this object, they must be relieved from every species of levy, sale, and forfeiture—from a levy and sale for taxes, as well as the ordinary judicial levy and sale.

No valid distinction can be drawn between the terms of protection given by the United States to the lands of Miami Indians and those given to the lands of Creeks and Seminoles.

In the case of *The New York Indians*, 5 Wall. 761, this Court pointed out that not even an express guarantee in the state statute that the tax would not be enforced by sale while the lands were in Indian possession could validate such a tax. *A fortiori*, the statutes now in question, which contain no such safeguards, "may well embarrass the occupants" (5 Wall. 771), and thus interfere practically, as well as theoretically, with property relations which, for a few more years, the Federal Government has reserved to its own control.

Since the decisions reached in the cases of the Kansas and the New York Indians, in 1866, no state, except Oklahoma, so far as available records indicate, has ever attempted to levy a tax upon the possession or transfer of restricted Indian lands. However, at the turn of the present century, an effort was made by local tax au-

thorities in the State of South Dakota to tax improvements, regarded as personalty, on lands allotted to a Sisseton Indian under the General Allotment Act. There was no specific reference to tax exemption in the governing treaties and statutes, but section 5 of the General Allotment Act provided that the United States should convey the land at the end of the trust period "free of all charge or encumbrances whatsoever." In holding this tax to be forbidden by the federal statutes, this Court reiterated the views expressed in *United States v. Rickert*, 188 U. S. 432. It said (p. 437):

If, as is undoubtedly the case, these lands are held by the United States in execution of its plans relating to the Indians—without any right in the Indians to make contracts in reference to them or to do more than to occupy and cultivate them—until a regular patent conveying the fee was issued to the several allottees, it would follow that there was no power in the State of South Dakota, for state or municipal purposes, to assess and tax the lands in question until at least the fee was conveyed to the Indians. These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition.

The views expressed in the *Rickert* case have been consistently followed in this Court. See *Carpenter v. Shaw*, 280 U. S. 363 and cases therein cited.

While the Court has frequently spoken of the exemption of restricted lands as an exemption attaching to a federal instrumentality, it should be noted that Indian tax exemption was not only recognized in the Constitution (Art. I, sec. 2) but was upheld by this Court before Chief Justice Marshall first enunciated the "instrumentality" doctrine. *New Jersey v. Wilson*, 7 Cranch 164. It cannot, therefore, be viewed as part of the legitimate or illegitimate progeny of that doctrine. The exemption of restricted lands from state taxes is more precisely viewed as an incident of the exclusive power of Congress to control the transfer of Indian property. As this Court said in *Bowling v. United States*, 233 U. S. 528, 535: "The authority of the United States to enforce the restraint lawfully created cannot be impaired by any action without its consent." Whether or not the Indian lands, subject to restrictions, are themselves "instrumentalities" of the United States, both the restrictions and their implications must be given effect because they have been validly adopted as a means of discharging the constitutional duty of the United States.

From this standpoint it makes no difference whether the state tax is linked to the possession or the transfer of Indian property or, if the latter, whether it is attached to transfers *inter vivos* or to transfers at death. Each of these

forms of taxation equally interferes with the exclusive control of the federal government over the transfer of Indian property. Obviously the federal government cannot provide for the transfer of an entire estate to a specified set of heirs or devisees if the state in which the restricted property is situated can direct that a portion of the restricted estate be transferred to the state itself in the form of a tax payment. And if the Indian has only land, some part must be sold to satisfy the tax and the prohibition against voluntary or involuntary alienation has been qualified by or in response to the state's demands. On the other hand, if the restricted estates of Indians do possess liquid assets, as in the cases here, the fact remains that even this personal property is restricted, and to compel its sale is to interfere no less with the guardianship exercised over this property by the Secretary of the Interior.<sup>72</sup> Again, the tendency of inheritance taxes is towards a fragmentation of estates. If there is to be a tendency to break up restricted lands, this is for Congress and not Oklahoma to decide.

This doctrine, universally recognized with respect to *ad valorem* taxation of restricted prop-

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<sup>72</sup> It is true of course, also that the Indian who possesses a restricted estate may dispose of it by will with the result that it may be divided among several heirs. But this is a result that has at least been expressly permitted by Congress, which has moreover itself determined to what extent the inherited property shall remain restricted.



erty, is equally applicable to a tax linked to the transfer of property, for control over the transfer of Indian property is the very essence of the federal government's jurisdiction in Indian matters.<sup>73</sup> It is true that Congress has never in so many terms prohibited a state from levying an inheritance tax on restricted Indian property. Nor for that matter has it expressly prohibited a state from levying a poll tax on Indians based upon the amount of restricted property owned. There are in fact an infinite number of ways by which an Indian may be separated from his property and at an early period in our history, when a good many of these possible methods had been tried, Congress wisely eschewed any effort to specify the particular methods of transfer which might possibly be used by states or citizens to achieve that widely popular objective. Rather, Congress has deliberately chosen to use the broadest possible terms, in the statutes here relevant the terms "alienation" and "encumbrance," and these broad terms have from the beginning been fairly and broadly construed by all courts. Apart from the present litigation, they have similarly been construed by all the states as precluding the imposition of a state inheritance tax upon restricted property.

<sup>73</sup> See Margold, *Introduction to Handbook of Federal Indian Law*, pp. xii-xiii.

We recognize that the inheritance tax, particularly if there be liberal exemptions, may offer a more desirable means of introducing the Indian citizens of Oklahoma to the responsibilities of tax-payers than does an *ad valorem* property tax upon restricted lands. But this, we submit, is a question for Congress and not the courts. For many years, as we have shown, it has been assumed by all concerned that the Oklahoma inheritance tax was inapplicable to restricted Indian property. For many years it has been recognized that restrictions automatically carried with them freedom from all state taxation not expressly authorized by Congress. For many years Congress has legislated with precision and with specificity when state taxation of restricted property was to be allowed (see *infra*, pp. 81-82). Against this background it needs more than a conclusion that it would be good policy for Congress to allow state inheritance taxation to justify the Court in changing the rule as to taxation of restricted property.

At least so far as concerns the restricted lands involved in these cases, there is nothing in *Shaw v. Oil Corp.*, 276 U. S. 575, that casts doubt upon the rule that the effect of restrictions is to bar state taxation. This case involved the question whether lands purchased for Indians with the proceeds of restricted property could not only be subjected to restrictions against voluntary

alienation, as this Court had already held in *Sunderland v. United States*, 266 U. S. 226,<sup>14</sup> but were also rendered tax exempt by virtue of the restrictions inserted in the deed at the direction of the Secretary of the Interior. This Court held that this could not be done by "a mere conveyancer's restriction," with respect to land that was not the land originally allotted. But it rather plainly intimated that the case would have been otherwise if the restrictions had been imposed by an act of Congress, as is the case here. Thus the Court said (pp. 580-581):

\* \* \* But they [the purchased lands] are far less intimately connected with the performance of an essential governmental function than were the restricted allotted lands, and the accomplishment of their purpose obviously does not require entire independence of state control in matters of taxation. \* \* \* There are some instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks.

Indeed, Congress acted upon this suggestion of the Court, and provided a limited immunity for the purchased and restricted lands. See the act

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<sup>14</sup> It should be noted that in the *Sunderland* case the Court expressly limited its decision to the power of the Secretary to prevent a voluntary transfer of restricted property by the Indian owner (266 U. S. at 233).

of June 20, 1936 (49 Stat. 1542), as amended by the act of May 19, 1937 (50 Stat. 188); and the acts of March 2, 1931 (46 Stat. 1471), and June 30, 1932 (47 Stat. 474). See *Board of Commissioners v. Seber*, No. 556, this Term, pending decision.

The *Shaw* case, it is true, might have cast some doubt upon the exemption of the cash and bonds involved in cases of Lucy and Nitey, who died before the act of January 27, 1933, since at that time the funds were not restricted by express statutory provision, but only by long and judicially sanctioned practice. However, that act as noted above (pp. 67-68), was merely declaratory and was intended to be retroactive. And, if there otherwise were doubt, this Court may legitimately give heed to the congressional policy as reflected by the legislative reversal of the rule of the *shaw* case.

2. *The Lien*. The inheritance taxes involved in these cases impose, as we have shown, a lien upon all of the property of the decedent. The lien imposed by the Oklahoma statutes attaches at the moment of death, and thus an encumbrance is at once created that is entirely inconsistent with the restrictions. The possible consequences of a lien are so far-reaching that this Court held at an early date, in *The New York Indians*, 5 Wall. 761, that its mere existence in a state taxing statute invalidates it, despite the inclusion of a provision to the

effect that no foreclosure of a lien should affect the Indian's right of occupancy.<sup>75</sup>

It is of the first significance in this regard that Congress, in permitting specified types of taxation upon restricted property, has ordinarily taken pains that no tax lien should attach. The act of May 6, 1910 (36 Stat. 348), permitting taxation of restricted lands of the Omahas, provided that there should be no seizure or sale but that the taxes if unpaid should be canceled upon a certificate of the Secretary of the Interior that there were no funds. The act of March 3, 1921 (41 Stat. 1225), authorizes a tax on mineral production from Quapaw lands and provides that "such tax shall not become a lien or charge of any kind or character against the land or other property of said Indian owner." The act of May 27, 1924 (43 Stat. 176), provides that the production of minerals on restricted lands of the Kaw Indians may be taxed by the State of Oklahoma, and carries the same proviso that the tax shall not be a lien or charge against the property of the restricted

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<sup>75</sup> The recent decision in the case of *United States v. Alabama*, 313 U. S. 275, does not detract from the force of this decision. It was merely held in the *Alabama* case that, when the United States purchased land in a state to which a tax lien had already attached under state law, the United States necessarily held the land subject to the tax lien although, by virtue of the Government's ownership, it could no longer be foreclosed. The State was under no disability, as it is here, at the time the lien attached, since the land was then in private ownership, and the Court thus held only that the lien survived the transfer of the land to the Government.

Indian owner. The act of May 29, 1924 (43 Stat. 244), provides that the unallotted lands on Indian reservations other than the Five Tribes and Osage Indians shall be subject to lease for mining purposes and permits the taxation of mineral production by the state in which the lands are located in all respects the same as production on unrestricted lands; it, too, contains the proviso that the tax shall not become a lien against the land or property of the Indian owner. The act of April 17, 1937 (50 Stat. 68), amended the Quapaw act of March 3, 1921, *supra*, to provide that the tax on the gross production of minerals on restricted Quapaw lands shall be in lieu of all other state taxation, and further provides that the tax shall not become a lien against the land or other property of the Indian owner.<sup>76</sup>

This course of discriminating legislation heavily underscores the importance of subjecting restricted lands to taxation, if this be considered desirable, through a legislative qualification of

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<sup>76</sup> A few statutes permitting taxation contain no provision forbidding the lien. The act of March 3, 1921 (41 Stat. 1249), permits a mineral tax on Osage lands, but these are owned by the Nation, not the individuals. The act of May 10, 1928 (45 Stat. 495), authorizing mineral production taxes upon restricted lands of members of the Five Civilized Tribes, contains no prohibition of a lien, but the tax is by its nature imposed upon the liquid royalties of the Indian received by the Secretary. The same act, permitting the taxation of restricted lands in excess of 160 acres, contains no prohibition against a lien but the Indian is assured of a residue of tax-free lands which will remain in his possession.

the restrictions rather than through a judicial reversal of a practice and understanding of many years. The Court cannot easily prescribe that the tax shall be paid if possible but that restricted lands shall not be sold; it cannot well prescribe that 160 acres, or some other figure, of restricted lands be exempt but that the remainder shall be taxed. It can, if it chooses, decide the general policy; it can, if it chooses, pass a critical judgment on the reasoning which has led Congress to assume that restricted lands are beyond the reach of the state tax collector and has led all concerned to assume that this general exemption included inheritance taxes. But it must encounter the greatest difficulty if it is also to introduce any of the limitations which Congress has found appropriate with respect to other taxes.

Of even greater importance, a decision of this Court that the tax applies to restricted lands would apparently cast a cloud upon and threaten foreclosure of every parcel of restricted land in Oklahoma which has been transferred at the death of an owner with property above the statutory exemptions since 1915. We have shown above (pp. 25-27) that the inheritance and estate taxes involved in these cases carry a lien which remains upon the transferred property until paid. In that event, a reversal of these cases, instead of affording to the Indians the generous protection which they have always received at the bar of this



Court, would have converted the restrictions from a protection to an ensnarement, and would seem to serve as the vehicle for one of the major instances of land divestment in a history which is already both long and tragic in this respect."

3. *The Mechanics of Collection*.—Both section 10 of chapter 162 of the Session Laws of Oklahoma of 1915, and section 7 of chapter 296 of the Session Laws of Oklahoma of 1919, provide that an executor or administrator "shall not deliver any legacy or property subject to the tax under this act to any person until he shall have collected the tax thereon." Since the restricted property is in the control and custody of the United States, the provision cannot validly be applied.

Sections 8 and 5 of the respective statutes, as well as section 25 of the 1935 tax law, also provide that the executor or administrator shall not be entitled to any final accounting unless he can produce a receipt showing that the inheritance taxes have been paid. Neither the Secretary nor

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" Conceivably, this Court might in some fashion excise the lien from the tax statute, as Congress has frequently done in permitting a limited taxation of restricted lands. Conceivably, it might in simple justice make its decision prospective only. *Cf. Montgomery Ward & Co. v. Duncan*, 311 U. S. 243, 255; *Reed, J.*, concurring in *R. F. C. v. Prudential Group*, 311 U. S. 579, 583; Brief for Government on Rehearing in *Helvering v. Gerhardt*, Nos. 779-781, 1938 Term. But the very difficulty of these devices affords powerful evidence that the State here asks the Court to provide a result which is legislative in its nature.

the Superintendent can be supposed to stand in need of a state court discharge, and it cannot be that Congress intended to leave the estates unsettled until they submitted themselves to the state court.

Section 9 of the 1935 tax law authorizes an executor or administrator to convert property of an estate into cash if necessary to pay the estate tax, and also makes them personally liable for the tax. The provisions are either inapplicable to the restricted property held by the Secretary or are invalid.

Section 10 of the same law forbids any bank or similar institution which may have custody of securities from delivering them without retaining a sufficient amount of such securities to pay the estate tax. No state law can fix the terms on which the United States may withdraw its deposits from its banks, and the provision is absurd if applied to the deposits with the Treasurer of the United States.

It may be that this Court could make a discriminating excision of the administrative features of the Oklahoma inheritance taxes here involved and produce a workable tax. But, as in the case of the tax liens, the inherent difficulties of this essentially legislative task are themselves strong arguments against any sudden imposition of this tax by judicial decision.

4. *The Administrative Construction.*—The first inheritance tax was enacted by the Oklahoma Leg-

islature in 1908. S. L. 1907-1908, secs. 7712-7715, pp. 733-734. We have shown above (pp. 37-39) that during most of the subsequent 35 years the state officials themselves have made no effort to collect a tax upon the transfer at death of restricted property of members of the Five Civilized Tribes, and that during the same period, the Indians and the federal officials administering their affairs have always assumed that the transfer at death of restricted property was not, in the absence of congressional authority, taxable by the state. During this period, there have been repeated congressional re-examinations of the question of restrictions and exemptions of Indian lands in Oklahoma.

This long-continued administrative practice was, as we have shown above (pp. 38-39), made known to Congress.

We have, then, a 35-year period in which neither the Federal officials charged with the administration of Indian affairs, nor the Indians themselves supposed that the state inheritance taxes were applicable to restricted property transferred by members of the Five Civilized Tribes. The administrative construction was contemporaneous, and must for this reason be given weight. *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 315; *United States v. Amer. Trucking Ass'ns*, 310 U. S. 534. The administrative construction was by the Department which participated in the formulation of much of the Federal legislation, and must for

this reason be given weight. *Blanset v. Cardin*, 256 U. S. 319, 326; *Hassett v. Welch*, 303 U. S. 303, 310-311. The administrative construction was long-continued, and must for this reason be given weight. *New York, N. H. & H. R. Co. v. I. C. C.*, 200 U. S. 361; *Norwegian Nitrogen Co. v. United States*, *supra*, 313-315. The administrative construction was followed by a series of statutes amending and adjusting the scope of the Federal restrictions and must for this reason be given weight, as having presumably been approved and confirmed by Congress. *Taft v. Commissioner*, 304 U. S. 351, 357; *Great Northern Ry. Co. v. United States*, 315 U. S. 262, 275-276.

The administrative construction was, finally, as we have shown, not only that of the Federal officials who were charged with the duty of protecting the interests of the Indians but was also for most of this period that of the tax officials who were charged with the duty of collecting all legally available revenue, and is for this reason entitled to especial weight. *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 351-352; *United States v. Cooper Corp.*, 312 U. S. 600, 614.

#### D. THE EFFECT OF THE STATUTORY EXEMPTIONS

Much of the property involved in these cases is not only restricted but is subject to a specific tax exemption. We have shown above (pp. 58-59) that these exemptions were not primarily designed

to offer state tax exemption, which was implied by the restrictions, but to provide an exemption against Federal taxation or to limit the exemption which otherwise would have applied. However, it may be well briefly to discuss the terms and the effect of these exemptions viewed independently of the restrictions which they qualify.

The specific tax exemptions which appear in these cases are cast in broad and general language: "nontaxable \* \* \* in perpetuity";<sup>7</sup> "nontaxable \* \* \* for twenty-one years";<sup>8</sup> "exempt from taxation as long as the title remains in the original allottee"<sup>9</sup> and "exempt from taxation while the title remains in the Indian" or in his full-blood heir or devisee.<sup>10</sup>

These broad terms must be read to include an exemption against all forms of state taxation with respect to the lands. They are not exemptions carved out of a general taxing statute, and therefore to be construed strictly. They are, instead, the last vestiges of the Indians' traditional and often-promised freedom from state control and state exaction. Many treaties had solemnly guaranteed this freedom (*supra*, pp. 52-55) and the Indians had bitterly opposed the progressive inroads on their self-government and

<sup>7</sup> Act of July 1, 1898 (30 Stat. 568).

<sup>8</sup> Act of March 1, 1901 (31 Stat. 861); act of June 30, 1902 (32 Stat. 500).

<sup>9</sup> Act of April 26, 1906 (34 Stat. 137).

<sup>10</sup> Act of May 10, 1928, sec. 4 (45 Stat. 495).

their freedom from state control and taxation. When, in the Allotment Agreements, it was stipulated that the homestead or the allotted lands should not be taxed, it must have meant just that to the Indians. Certainly they were not expected, at their peril, to inquire into the white man's theories of taxation and to demand (many years in advance of this Court's clarifications) that the exemption specify that it include "indirect" as well as "direct" taxation; that it cover "excises" as well as "imposts"; that it reach to taxes on the shift of economic benefits as well as to taxes on the "economic benefits," the lands, themselves.

We are dealing, in short, with the last residue of an all-inclusive exemption, not only from state taxation but from state control, and it is not, in cases such as this, the residual exemption but the exceptions and the inroads on the tribal immunity which must be read strictly. In *Carpenter v. Shaw*, 280 U. S. 363, this Court extended the Choctaw allotment exemptions beyond land or real estate taxes to include a tax on mineral royalties. The Court said (280 U. S. at 366-367):

While in general tax exemptions are not to be presumed and statutes conferring them are to be strictly construed, \* \* \* the contrary is the rule to be applied to tax exemptions secured to the Indians by agreement between them and the national government. \* \* \* Such provisions are

to be liberally construed. Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith \* \* \*. And they must be construed not according to their technical meaning but "in the sense in which they would naturally be understood by the Indians." *Jones v. Meehan*, 175 U. S. 1, 11.

This is a settled rule in this Court. *Worcester v. State of Georgia*, 6 Pet. 515, 582; *The Kansas Indians*, 5 Wall. 737, 760; *Choate v. Trapp*, 224 U. S. 665, 675; *Ex parte Webb*, 225 U. S. 663, 683; *Oklahoma v. Barnsdall Corp.*, 296 U. S. 521, 526.

For this reason, decisions that statutory tax exemptions do not include an exemption from estate taxes are inapplicable here. See *U. S. Trust Co. v. Helvering*, 307 U. S. 57 (estate tax on proceeds of War Risk Insurance); *Murdock v. Ward*, 178 U. S. 139 (Federal inheritance tax on Federal bonds); *Hamersly v. United States*, 83 C. Cls. 687, cert. den., 300 U. S. 659 (gift tax on Federal bonds); *Phipps v. Commissioner*, 91 F. (2d) 627 (C. C. A. 10); cf. *United States v. Stewart*, 311 U. S. 60 (income tax on capital gains on Farm Loan bonds). By the same token, decisions that a supposed constitutional immunity of government bonds does not extend to inheritance or estate taxes are inapplicable. See *Plummer v. Coler*, 178 U. S. 115; *Greiner v. Lewellyn*,



258 U. S. 384; *cf. Willcuts v. Bunn*, 282 U. S. 216. These cases, it may be added, are inapplicable not only because of the peculiar features of Indian law but also because the bases of the supposed immunity—a tax on the government's transaction, and a burden on its operations—were not present in the collateral transaction of a transfer at death, while the basis of the immunity here, an absence of state power to tax or to control transfers of restricted lands, is equally applicable to the transfer at death.<sup>82</sup>

As we have shown, the Indians and the Federal officials have for 35 years each considered all transfers of restricted property to be exempt from any form of state taxation, and the state officials themselves have for most of this period so considered it. If the language of the tax exemptions is to be read as it was understood in the allotment agreements, and as this meaning was reflected in subsequent practice and statutes, they must be read to include inheritance taxes upon the transfer of restricted lands within their prohibitions.<sup>83</sup>

<sup>82</sup> No special attention need be paid *United States v. Perkins*, 163 U. S. 625, and *Snyder v. Bettman*, 190 U. S. 249, which held that a tax may be laid by the Federal or state government on a legacy to the other. We do not claim an immunity of the Indian, or of legacies to him, but only of the transfer of restricted property.

<sup>83</sup> If the decision of the Court should turn on the presence of specific tax exemptions, it would cover, under the governing legislation, all of the allotted lands of Lucy and Nitey and the 40-acre homestead and 120 acres of the surplus allotments of Wosey Deere (see *supra*, pp. 4-12).

**E. THERE IS NO THEORY WHICH WOULD SERVE TO PERMIT THE STATE TO TAX THE TRANSFER OF RESTRICTED PROPERTY AT DEATH**

We have shown that the inheritance and estate taxes involved in these cases are inapplicable to restricted property by the force of the controlling Federal statutes which impose the restrictions upon the transfer of this property. There remains only to consider whether there is anything which can be urged as a special justification for the tax. We can think of only two arguments: (1) the tax is the price of a privilege conferred by the state; and (2) the rule as to Federal estate taxes applies equally to state taxation. Neither is valid.

1. *The Transfer at Death is Not a State Privilege.*—We have discussed above (pp. 28–35) the nature of the probate system which is applicable to the restricted property of members of the Five Civilized Tribes. From this it is entirely clear that the devolution of restricted property is a privilege granted by Federal not state law, and is accomplished jointly through Federal officials and state courts serving as Federal agencies. There is, therefore, no room for an argument that the descent or distribution of the restricted property is a state-conferred privilege of such a nature as to permit the imposition of an otherwise forbidden tax upon the transfer at death.

The argument would not be sound, in any event, since the exercise of a state privilege is insufficient

to justify taxation in conflict with a Federal statute which operates to immunize the transaction. See, e. g., *Federal Land Bank v. Crosland*, 261 U. S. 374; *Pittman v. Home Owners' Corp.*, 308 U. S. 21.

2. *The Rule as to Federal Estate Taxation is Inapplicable.* In *Landman v. Commissioner of Internal Revenue*, 123 F. (2d) 787 (C. C. A. 10), cert. den., 315 U. S. 810, the court below held that the Federal estate tax was applicable to restricted lands and funds of a member of the Five Civilized Tribes. The opinion was placed on the grounds that: (1) the general doctrine of intergovernmental immunity has narrowed in recent years, (2) the Federal statute reached to the estate of "every decedent," and (3) the tax was not placed directly on the restricted and exempt property but upon the shift of the economic benefits. The first ground of the opinion is irrelevant to our argument, since we place no reliance upon the doctrine of intergovernmental tax immunity. The second ground does not contradict our position, as we show below. The third ground is contrary to our position and, we think, reads the exemptions carried by the restrictions with too narrow and pedantic an eye.

We do not, however, take issue with the *Landman* decision and think its result correct. It is, however, inapplicable to the present cases. The restrictions upon the property, which are the basis of our argument and the foundation of the long

practice of exempting restricted property and its transfer from state taxation, were not restrictions against the United States. They were restrictions against third persons, whether individuals or states. Quite obviously, the Congress did not intend to curtail the power of the United States when it forbade alienation except with the approval of the Secretary of the Interior.<sup>84</sup> Equally obviously, as we have shown above (pp. 48-66), it did intend to curtail the power of state officials when it forbade both voluntary and involuntary alienation of the restricted property. Accordingly, a Federal tax on the property or its transfer would in no sense contradict the Federal restrictions, while a state tax, unauthorized by Congress, would be a flat contradiction of the Federal restrictions upon outside interference.

This basic distinction between state and Federal taxation is, the Court will note, only indirectly a product of Article VI of the Constitution and the resulting supremacy of the Federal laws. It is, in its immediate application, simply a question of the intended scope of the restrictions. But the same result is reached if one views the question from the broader ground of Article VI. A Federal tax

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<sup>84</sup> Compare the treaties of 1866, 14 Stat. 755, 785, which subject the Creeks and the Seminoles to Federal but not state control (*supra*, p. 54), and contrast the minute control reserved to the United States in the allotment agreements and subsequent legislation with the provisions of the Enabling Act which so carefully excluded state jurisdiction over Indian Affairs (see *supra*, pp. 60-61).

which stands in substantial contradiction of a Federal restriction or a Federal exemption is not barred by the Constitution. But a state tax which is in such substantial contradiction of Federal statutes as that here presented must without more fall before the force of Article VI.

F. THE DECISION BELOW WAS COMPELLED BY  
CHILDERS V. BEAVER

We have reserved until the end our argument based upon the decision of this Court in *Childers v. Beaver*, 270 U. S. 555. This restraint is due to our belief that the decision, while correct in result, rests upon reasoning which is not in every respect satisfactory. Thus, while (1) we take issue with petitioner's contention that the case is distinguishable, (2) we advance it as support for our position only with considerable hesitation.

1. *The Case Is Not Distinguishable.*—The *Beaver* case involved an attempted application of the state inheritance tax to the restricted lands of the Quapaws. The State argued there, as it does here, that the property descended under state law and was therefore subject to state taxation. This Court unanimously rejected the argument. Its entire opinion, omitting the statement and citations, reads (p. 559):

The duty of the Secretary of the Interior to determine the heirs according to the State law of descent, is not questioned. Congress provided that the lands should

descend and directed how the heirs should be ascertained. It adopted the provisions of the Oklahoma statute as an expression of its own will—the laws of Missouri or Kansas, or any other State, might have been accepted. The lands really passed under a law of the United States, and not by Oklahoma's permission.

It must be accepted as established that during the trust or restrictive period Congress has power to control lands within a State which have been duly allotted to Indians by the United States and thereafter conveyed through trust or restrictive patents. This is essential to the proper discharge of their duty to a dependent people; and the means or instrumentalities utilized therein cannot be subjected to taxation by the State without assent of the federal government.

The opinion, whatever the adequacy of the reasoning, is entirely applicable here. The property passed under federal not state law. The use of the state courts for one part of the probate function did not make the descent or inheritance one under state law or the probate function a state rather than Federal function. The restrictions continued, and the Government's duty to a dependent people was present, equally with these Five Tribes decedents as with the Quapaw decedent.

The petitioner argues that the Quapaw statutes are so different from the Five Tribes statutes

that the *Beaver* case is not controlling (Pet. 20-26). It relies on sections 1 and 2 of the act of June 25, 1910 (36 Stat. 855), as amended by the act of February 14, 1913 (37 Stat. 678). These sections give to the Secretary power to determine heirship and to approve wills. But this simply shows that Congress has provided a different probate mechanism, and not that the function is any the less a Federal function or the governing law any the less Federal law in the Five Tribes than in the Quapaw probate system. Petitioner relies further on the contrasting results in *Blansett v. Cardin*, 256 U. S. 319, and *Blundell v. Wallace*, 267 U. S. 374. The *Blansett* case held that the Oklahoma statute forbidding disinheritance of the husband was inapplicable to a Quapaw will, because the Secretary under the acts of 1910 and 1913 had the exclusive power to approve the will, while the *Blundell* case held the statute applicable to a Five Tribes will, because there was no conflict with the Federal statute which contemplated that the Indian will should in general be subject to state law. These cases illustrate simply particular differences in the statutes governing the two probate systems and in no sense contradict the settled rules that Five Tribes estates pass under Federal law and through a Federal probate system.

In *Childers v. Pope*, 119 Okla. 300, the Supreme Court of Oklahoma followed the



*Beaver* case and held the inheritance tax inapplicable to the estate of an Osage decedent. The Osage probate system, it may be noted, differs from those of both the Quapaw and Five Tribes. The will of a deceased Osage must, as with the Quapaws, be approved by the Secretary but the heirs, as with the Five Tribes, are to be determined by the state courts. Sections 3 and 8, act of April 18, 1912 (37 Stat. 86); *Work v. Lynn*, 266 U. S. 161. In the *Pope* case the deceased Osage died intestate, so the case seems to be on all fours with the present cases.

2. *The Result is Correct.*—The reasoning in the *Beaver* case, as suggested above, is not entirely satisfactory. The opinion states two propositions: (1) the property passed under Federal law, and (2) the restricted lands are instrumentalities of Congress and may not be taxed without its consent.

The last proposition, in the breadth with which it is stated, cannot be accepted. See *Shaw v. Oil Corp.*, 276 U. S. 575; *James v. Dravo Contracting Co.*, 302 U. S. 134; *Helvering v. Mountain Corp.*, 303 U. S. 376; *Graves v. N. Y. ex rel. O'Keefe*, 306 U. S. 466; *Alabama v. King & Boozer Co.*, 314 U. S. 1. However, as indicated above, the statutory restrictions serve in themselves to forbid taxation upon the land or upon its transfer, and the decision of the Court in the *Beaver* case is entirely correct if the generaliza-

tion of "instrumentality" be taken to be a convenient shorthand for the settled rule that the State can neither tax nor encumber restricted lands nor their transfer.

The first proposition, if construed to mean that the State cannot tax any transfer or privilege conferred by Federal law, is also unacceptable. *Knowlton v. Moore*, 178 U. S. 41; see *Graves v. New York ex rel. O'Keefe*, *supra*; *James v. Dravo Contracting Co.*, *supra*; *Helvering v. Mountain Corp.*, *supra*. But here again the difficulty may be as much one of language as of basic reasoning. The State apparently had argued that the transfer of the property at death was possible only because of a privilege conferred by State law. Mr. Justice McReynolds may be supposed to have taken, as the simplest of the two answers available (*supra*, pp. 92-93), that which pointed out that the transfer was accomplished not by State but by Federal law.

In short, the *Beaver* case reached an entirely correct result and perhaps even its reasoning is sound if the opinion be understood to mean that: (1) in view of the settled effect of restrictions to remove land from state taxation, the state could not tax an "instrumentality" which was so protected and (2) the state could not argue that the tax was nonetheless a legitimate price of a privilege, for the property passed under Federal not state law.

## CONCLUSION

For these reasons, it is respectfully submitted that the decision of the court below should be affirmed.

✓ WARNER W. GARDNER,  
*Solicitor,*

✓ FELIX S. COHEN,  
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WILLIAM H. FLANERY,  
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The Solicitor General authorizes the filing of this brief. The preparation of the brief was assigned to the Department of the Interior. The Solicitor General takes no exception to the position taken.

✓ CHARLES FAHY,  
*Solicitor General.*

APRIL, 1943.

## APPENDIX

### TREATIES

Treaty of September 18, 1823 (7 Stat. 224).

#### Article I:

The undersigned chiefs and warriors, for themselves and their tribes, have appealed to the humanity, and thrown themselves on, and have promised to continue under, the protection of the United States, and of no other nation, power, or sovereign; and, in consideration of the promises and stipulations hereinafter made, do cede and relinquish all claim or title which they may have to the whole territory of Florida, with the exception of such district of country as shall herein be allotted to them.

#### Article IV:

The United States promise to guaranty to the said tribes the peaceable possession of the district of country herein assigned them \* \* \*

Treaty of March 24, 1832 (7 Stat. 366).

#### Article 14:

The Creek country west of the Mississippi shall be solemnly guaranteed to the Creek Indians, nor shall any State or Territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves, so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them. And

the United States will also defend them from the unjust hostilities of other Indians, and will also as soon as the boundaries of the Creek country West of the Mississippi are ascertained, cause a patent or grant to be executed to the Creek tribe; agreeably to the 3d section of the Act of Congress of May 2d, (28) 1830, entitled "An Act to provide for an exchange of lands with the Indians residing in any of the States, or Territories, and for their removal West of the Mississippi."

Treaty of May 9, 1832 (7 Stat. 369).

Article I:

The Seminole Indians relinquish to the United States, all claim to the lands they at present occupy in the Territory of Florida, and agree to emigrate to the country assigned to the Creeks, west of the Mississippi river; it being understood that an additional extent of territory, proportioned to their numbers, will be added to the Creek country, and that the Seminoles will be received as a constituent part of the Creek nation, and be readmitted to all the privileges as members of the same.

Treaty of February 14, 1833 (7 Stat. 417).

Article 3:

The United States will grant a patent, in fee simple, to the Creek Nation of Indians for the land assigned said nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States—and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned them.

Treaty of March 28, 1833 (7 Stat. 423).

Preamble:

Now, therefore, the Commissioners aforesaid, by virtue of the power and authority vested in them by the treaty made with Creek Indians on the 14th of February 1833, as above stated, hereby designate and assign to the Seminole tribe of Indians, for their separate future residence, forever, a tract of country lying between the Canadian river and the north fork thereof \* \* \*.

Treaty of August 7, 1856 (11 Stat. 699).

Article I:

The Creek Nation doth hereby grant, cede, and convey to the Seminole Indians, the tract of country included within the following boundaries \* \* \*

Article III:

The United States do hereby solemnly guarantee to the Seminole Indians the tract of country ceded to them by the first article of this convention; \* \* \*

Article IV:

The United States do hereby solemnly agree and bind themselves, that no State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians, and that no portion of either of the tracts of country defined in the first and second articles of this agreement shall ever be embraced or included within, or annexed to, any Territory or State, nor shall either, or any part of either, ever be erected into a Territory without the full and free consent of the legislative authority of the tribe owning the same.

## Treaty of June 14, 1866 (14 Stat. 785).

## Article 12:

The United States reaffirms and re-assumes all obligations of treaty stipulations with the Creek nation entered into before the treaty of said Creek nation with the so-called Confederate states, July tenth, eighteen hundred and sixty-one, not inconsistent herewith; and further agrees to renew all payments of annuities accruing by force of said treaty stipulations from and after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six, except as is provided in article eleventh.

## Treaty of March 21, 1866 (14 Stat. 755).

## Article I:

\* \* \* In return for these pledges of peace and friendship, the United States guarantee them quiet possession of their country, and protection against hostilities on the part of other tribes; \* \* \*

## Article VII:

The Seminole nation agrees to such legislation as Congress and the President may deem necessary for the better administration of the rights of person and property within the Indian territory: *Provided, however*, [That] said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs.

## Article IX:

The United States reaffirms and re-assumes all obligations of treaty stipulations entered into before the treaty of said Semi-



nole nation with the so-called confederate states, \* \* \*

### FEDERAL STATUTES

Act of March 3, 1893 (27 Stat. 612, 645).

#### Section 15:

The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. \* \* \*

#### Section 16:

The President shall nominate and, by and with the advice and consent of the Senate, shall appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muscogee (or Creek) Nation, the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians \* \* \*

Act of June 28, 1898 (30 Stat. 495, 497).

#### Section 11:

\* \* \* *Provided further*, That the lands allotted shall be nontransferable until after full title is acquired and shall be liable for

no obligations contracted prior thereto by the allottee, and shall be nontaxable while so held. \* \* \*

Act of July 1, 1898 (30 Stat. 567).

All contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void.

\* \* \* \* \*

When the tribal government shall cease to exist the principal chief last elected by said tribe shall execute, under his hand and the seal of the Nation, and deliver to each allottee a deed conveying to him all the right, title, and interest of the said Nation and the members thereof in and to the lands so allotted to him, and the Secretary of the Interior shall approve such deed, and the same shall thereupon operate as relinquishment of the right, title, and interest of the United States in and to the land embraced in said conveyance, and as a guarantee by the United States of the title of said lands to the allottee; and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purposes. Each allottee shall designate one tract of forty acres, which shall, by the terms of the deed, be made inalienable and nontaxable as a homestead in perpetuity.

\* \* \* \* \*

The United States courts now existing, or that may hereafter be created, in Indian Territory shall have exclusive jurisdiction of all controversies growing out of the title,

ownership, occupation, or use of real estate owned by the Seminoles, \* \* \*

Act of March 1, 1901 (31 Stat. 861).

**Section 7:**

Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above: \* \* \*

The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, free from such limitation.

**Section 44:**

This agreement shall in no wise affect the provisions of existing treaties between the United States and said tribe except so far as inconsistent therewith.

Act of June 30, 1902 (32 Stat. 500).

Section 16:

Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear. \* \* \*

Act of April 26, 1906 (34 Stat. 137).

Section 19:

That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: \* \* \* *Provided further*, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

## Section 23:

Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner.

Act of May 27, 1908 (35 Stat. 312).

## Section 1:

\* \* \* All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. \* \* \*

## Section 4:

That all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized

Tribes: *Provided*, That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law.

\* \* \* \* \*

Section 8:

That section twenty-three of an Act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and other purposes," approved April twenty-sixth, nineteen hundred and six, is hereby amended by adding at the end of said section, the words "or a judge of a county court of the State of Oklahoma."

Act of June 14, 1918 (40 Stat. 606).

That a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the probate court of the State of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said State for determination of heirship in closing up the estates of deceased persons, shall be conclusive of said question: *Provided*, That an appeal may be taken in the manner and to the court provided by law, in cases of appeal in probate matters generally. *Provided further*, That where the time limited by the laws of said State for the institution of administration proceedings has elapsed without their institution, as well as in cases where there exists no lawful ground for the institution of administration proceedings in said courts, a petition may be filed therein hav-

ing for its object a determination of such heirship and the case shall proceed in all respects as if administration proceedings upon other proper grounds had been regularly begun, but this proviso shall not be construed to reopen the question of the determination of an heirship already ascertained by competent legal authority under existing laws: *Provided further*, That said petition shall be verified, and in all cases arising hereunder service by publication may be had on all unknown heirs, the service to be in accordance with the method of serving non-resident defendants in civil suits in the district courts of said State; and if any person so served by publication does not appear and move to be heard within six months from the date of the final order, he shall be concluded equally with parties personally served or voluntarily appearing.

Act of May 10, 1928 (45 Stat. 495) as amended by the Act of May 24, 1928 (45 Stat. 733).

#### Section 1:

That the restrictions against the alienation, lease, mortgage, or other encumbrance of the lands allotted to members of the Five Civilized Tribes in Oklahoma, enrolled as of one-half or more Indian blood, be, and they are hereby, extended for an additional period of twenty-five years commencing on April 26, 1931: \* \* \*

\* \* \* \* \*

#### Section 3:

That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, shall



be subject to all State and Federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from the individual Indian funds held under his supervision and control and belonging to the Indian owners of the lands, the tax or taxes so assessed against the royalty interest of the respective Indian owners in such oil, gas, and other mineral production.

Section 4:

That on and after April 26, 1931, the allotted, inherited, and devised restricted lands of each Indian of the Five Civilized Tribes in excess of one hundred and sixty acres shall be subject to taxation by the State of Oklahoma under and in accordance with the laws of that State, and in all respects as unrestricted and other lands: *Provided*, That the Indian owner of restricted land, if an adult and not legally incompetent, shall select from his restricted land a tract or tracts, not exceeding in the aggregate one hundred and sixty acres, to remain exempt from taxation, and shall file with the Superintendent of the Five Civilized Tribes, a certificate designating and describing the tract or tracts so selected: \* \* \* and said lands, designated and described in the approved certificates so recorded, shall remain exempt from taxation while the title remains in the Indian designated in such approved and recorded certificate, or in any full-blood Indian heir or devisee of the land: *Provided*, That the tax exemption shall not extend beyond the period of restrictions provided for in this Act: *And provided further*, That the tax exempt land of any such Indian allottees,

heir, or devisee shall not at any time exceed one hundred and sixty acres.

Act of January 27, 1933 (47 Stat. 777).

\* \* \* That all funds and other securities now held by or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian bloods, enrolled or unenrolled, are hereby declared to be restricted and shall remain subject to the jurisdiction of said Secretary until April 26, 1956, subject to expenditure in the meantime for the use and benefit of the individual Indians to whom such funds and securities belong, under such rules and regulations as said Secretary may prescribe: *Provided*, That where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for restricted Indians, such lands shall remain restricted and tax-exempt during the life of and as long as held by such restricted Indians, but not longer than April 26, 1956, unless the restrictions are removed in the meantime in the manner provided by law: *Provided further*, That such restricted and tax-exempt land held by anyone, acquired as herein provided, shall not exceed one hundred and sixty acres: *And provided further*, That all minerals including oil and gas, produced from said land so acquired shall be subject to all State and Federal taxes as provided in section 3 of the Act approved May 10, 1928 (45 Stat. 495).

Act of December 24, 1942 (Public Law 833, 77th Cong.), ch. 813, 2d sess.

\* \* \* That exclusive jurisdiction is hereby conferred on the Secretary of the Interior to determine the heirs after notice and hearing under such rules and regulations as he may prescribe, and to probate the estate of any deceased restricted Indian, enrolled or unenrolled, of the Five Civilized Tribes of Oklahoma, whenever the restricted estate consists only of funds or securities under the control of the Department of the Interior of an aggregate value not exceeding \$2,500: *Provided*, That where such decedent died prior to the effective date of this Act, the distribution of such funds and securities, including the decedent's share of any tribal funds, shall be made in accordance with the statute of descent and distribution applicable at the date of death: *And provided further*, That where the decedent dies subsequently to the effective date of this Act distribution of all such funds and securities, including tribal funds aforesaid, shall be effected in accordance with the statute of descent and distribution of the State of Oklahoma.

#### OKLAHOMA STATUTES

##### Ch. 162, Session Laws 1915.

Section 1. A tax is hereby laid upon the transfer to persons or corporations of property or any interest therein or income therefrom.

When the transfer is of tangible property in this state made by any person, or of intangible property made by a resident of this state at time of transfer:

First: By will or the intestate laws of this state;

Second: By deed, grant, bargain, sale or gifts, made in contemplation of the death

of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death;

Third: When the transferee becomes beneficially entitled in possession or expectancy by any such transfer whether made before or after the passage of this Act. Said tax shall be upon the clear market value of such property.

Section 2. Whenever the property within this state of a resident or non-resident decedent transferred by will is not specifically bequeathed or devised, such property shall for the purpose of this Act be deemed to be transferred proportionally to and divided pro rata among all the general legatees and devisees named in said will, including all transfers under a residuary clause.

\* Ch. 66, Art. 5, Session Laws 1935.

### Section 1. Inheritance and Transfer Tax.

A tax is hereby levied upon the transfer of the net estate of every decedent, whether in trust or otherwise, to persons, associations, or corporations, of property, real personal or mixed, whether tangible or intangible, or any interest therein or income therefrom, by will or the intestate laws of this state, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death, whether made before or after the passage of this Act. Such tax shall be imposed upon the value of the net estate and transfers at the rates, under the conditions, and subject to the exemptions and limitations hereinafter prescribed.

# SUPREME COURT OF THE UNITED STATES.

Nos. 623, 624 and 625.—OCTOBER TERM, 1942.

Oklahoma Tax Commission of the  
State of Oklahoma, Petitioner,  
623                    *vs.*  
The United States of America.

Oklahoma Tax Commission of the  
State of Oklahoma, Petitioner,  
624                    *vs.*  
The United States of America.

Oklahoma Tax Commission of the  
State of Oklahoma, Petitioner,  
625                    *vs.*  
The United States of America.

On Writs of Certiorari to  
the United States Circuit  
Court of Appeals for the  
Tenth Circuit.

[June 14, 1943.]

Mr. Justice BLACK delivered the opinion of the Court.

The United States brought these three actions to recover inheritance taxes imposed by the State of Oklahoma upon the transfer of the estates of three deceased members of the Five Civilized Tribes and paid under protest by the Secretary of the Interior from funds under his control belonging to those estates. The district court entered judgment on the merits for the state in each case. The Circuit Court of Appeals reversed. 131 F. 2d 635. We granted certiorari because of the importance of the cases in the administration of Indian affairs and to the State of Oklahoma. The basic questions to be decided are whether, as a matter of state law, the state taxing statutes reach these estates, and whether Congress has taken from the State of Oklahoma the power to levy taxes upon the transfer of all or a part of property and funds of these deceased Indians.

The properties of which the estates are composed fall into four main categories: land exempt from direct taxation; land not exempt from direct taxation; restricted cash and securities held for the Indians by the Secretary of the Interior; and miscellaneous



The administration is committed to the policy given by the State Department, and the Department of the Interior, and the United States Court of Appeals in *Cherokee v. Georgia*, 1831.

The Department of the Interior and the State Department are both the State and the Interior in their view upon the transfer of the land to the United States and the United States Court of Appeals in *Cherokee v. Georgia*, 1831. The Department of the Interior is committed to the policy given by the State Department, and the Department of the Interior, and the United States Court of Appeals in *Cherokee v. Georgia*, 1831. The Department of the Interior is committed to the policy given by the State Department, and the Department of the Interior, and the United States Court of Appeals in *Cherokee v. Georgia*, 1831.

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where existing treaties forbade the state's building such roads. Later, for a period of time, Indian lands held in trust by the United States were found to be constitutionally tax exempt on the theory that they were federal instrumentalities, i. e., that the lands were held by the United States for the Indians, and were therefore non-taxable. *United States v. Rickert*, 188 U. S. 432. In time, this constitutional concept was expanded to grant tax exemption to the income derived from Indian lands, whether tribally or individually owned, even when the privilege of exploitation had been granted to non-Indian lessees.<sup>4</sup> The instrumentality concept ultimately resulted in a decision exempting Indian estates from taxation. *Childers v. Beaver*, *supra*. None of these cases held, nor has this Court ever decided, that congressional restriction of an Indian's income carried an implication of estate tax exemption.

The underlying principles on which these decisions are based do not fit the situation of the Oklahoma Indians. Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in *Worcester v. Georgia*, *supra*; and, unlike the Indians involved in *The Kansas Indians* case, *supra*, they are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions.<sup>5</sup> Their lands are held in fee, not in trust, as in the *Rickert* case, and the doctrine of constitutional immunity from taxation for the income of their holdings on the federal instrumentality theory has been renounced. *Helvering v. Mountain Producers Corporation*, *supra*. *Childers v. Beaver*, *supra*, was in effect overruled by the *Mountain Producers* decision. The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication.

The cash and securities of which these estates are almost entirely composed were restricted by the Act of January 27, 1933.<sup>6</sup> Un-

<sup>4</sup> *Choctaw O. & Gulf R. v. Harrison*, 235 U. S. 292; *Indian Territory Co. v. Oklahoma*, 240 U. S. 522; *Jaybird Mining Co. v. Weir*, 271 U. S. 609; *Howard v. Gypsy Oil Co.*, 247 U. S. 503; *Large Oil Co. v. Howard*, 248 U. S. 549; *Gillespie v. Oklahoma*, 257 U. S. 501.

<sup>5</sup> Under the Acts of June 18, 1934, 48 Stat. 984, and June 26, 1936, 49 Stat. 1967, 25 U. S. C. § 501 *et seq.*, some progress has been made in the restoration of tribal government. Cohen, *Handbook of Federal Indian Law*, 455, 129-133, 142-143.

<sup>6</sup> 47 Stat. 777.

"... That all funds and other securities now held by or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in

less the tax immunity is granted by the restriction clause itself. there is not a word in the Act which even remotely suggests that Congress meant to exempt Indians' cash and securities from Oklahoma's estate taxes. We conclude that this Act does not exempt the restricted property from taxation for two reasons: (1) the legislative history of the Act refutes the contention that an exemption was intended; and (2) application of the normal rule against tax exemption by statutory implication prevents our reading such an implication into the Act.

The 1933 Act was intended to serve two purposes relevant to this case. One was to continue the restrictions on Indian property for the purpose of protecting the Indians from loss to individuals who might take advantage of them; and the other was to preserve the status of certain Indian land as non-taxable until 1956. See the concurring opinion of Mr. Justice RUTLEDGE in *Seber v. United States*, No. 556, decided this term. This Act was before two Congresses, the 71st and the 72nd. It was the subject of exhaustive debate, as well as of several committee reports, and there is no indication whatever in all that discussion of an intention to exempt Indians from estate taxes.<sup>7</sup>

The bill was sponsored by Oklahoma Congressmen who said nothing which supports the imputation that they intended to deprive their state of this income. It was described by its sponsor, Congressman Hastings, as follows:

"You ask me what the bill does. If the Members of Congress understood the bill there would not be a vote against it. Oil

Oklahoma of one-half or more Indian bloods, enrolled or unenrolled, are hereby declared to be restricted . . . *Provided*, That where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for restricted Indians, such lands shall remain restricted and tax-exempt during the life of and as long as held by such restricted Indians, but not longer than April 26, 1953. . . . *And provided further*, That all minerals including oil and gas, produced from said land so acquired shall be subject to all State and Federal taxes as provided in section 3 of the Act approved May 10, 1928 (45 Stat. 495)."

<sup>7</sup> Elements of the 1933 statute were included in H. R. 15603, 71st Congress. The bill was recommitted to the Committee on Indian Affairs for further consideration, 74 Cong. Rec. 3956-3958. This discussion includes a report of the Department of the Interior recommending legislation substantially similar to that finally enacted in 1933. The House later amended the provisions of its own bill into S. 6169. 74 Cong. Rec. 7219-7222. The bill as amended was not approved by the Senate. The plan was re-introduced in the 72d Congress as H. R. 8750 and was discussed by the House at 75 Cong. Rec. 8163-8170, and by the Senate at 76 Cong. Rec. 2200. This bill was passed by the 72d Congress and became the statute under consideration.

has been struck underneath some of the lands allotted to the members of these tribes. Some of these full-blood allottees without business experience, now have to their credit \$100,000, \$200,000, and it is estimated, up to \$1,000,000. Suppose one of these Indian allottees died after April 26, 1931. Then this money must be turned over to these heirs without supervision. Do you want to do that? Is there a man on the floor of the House who would want to do that?"<sup>8</sup>

This purpose, and none other, is reiterated throughout the discussion—not a word of an intention to expand tax exemptions was spoken by any Congressman.

The legislative history not only fails to give any affirmative support to such an implication but expressly negatives that intent. The principal clause of the bill dealing with taxation is that which continues a limited land tax exemption for twenty-five years. On two separate occasions, in two Congresses, the bill's sponsor assured the House of Representatives: "This [bill] only applies to restricted and tax-exempt land. This does not increase tax-exempt land at all."<sup>9</sup> Such a bill, carefully drawn so as not to widen tax exemptions for land, and without a word of such intent in its legislative history, cannot be supposed by implication to have prohibited estate taxes. If there could be any doubt of this proposition it is surely removed by a later clause of the 1933 statute which provides that all minerals extracted from the land should be subject to state taxation.<sup>10</sup> Congress could not have intended that the minerals themselves should be subject to taxation, but that the proceeds of their sale, even further removed from the land itself, should be immune.

This Court has repeatedly said that tax exemptions are not granted by implication. *United States Trust Co. v. Helvering*, 307 U. S. 57, 60. It has applied that rule to taxing acts affecting Indians as to all others. As was said of an excise tax on tobacco produced by the Cherokee Indians in 1870, "If the exemption had been intended, it would doubtless have been expressed." *Cherokee Tobacco*, 11 Wall. 616, 620. In holding the income tax applicable to Indians, the Court said, "The terms of the 1928 Revenue Act are very broad and nothing there indicates that Indians are to be excepted. . . . If exemption exists it must derive plainly

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<sup>8</sup> 75 Cong. Rec. 8163.

<sup>9</sup> 74 Cong. Rec. 7222 and, similarly, 75 Cong. Rec. 8170.

<sup>10</sup> See the last clause of the statute as set forth in Note 6, *supra*.

from agreements with the Creeks or some Act of Congress dealing with their affairs." *Superintendent v. Commissioner, supra*, 420. If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion can not rest on dubious inferences. "Nontaxability and restriction upon alienation are distinct things," *Superintendent v. Commissioner, supra*, 421, and when Congress wants to require both nonalienability and nontaxability it can, as it has so often done, say so explicitly.<sup>11</sup>

It is true that our interpretation of the 1933 statute must be in accord with the generous and protective spirit which the United States properly feels toward its Indian wards, but we cannot assume that Congress will choose to aid the Indians by permanently granting them immunity from taxes which they are as able as other citizens to pay. It runs counter to any traditional concept of the guardian and ward relationship to suppose that a ward should be exempted from taxation by the nature of his status, and the fact that the federal government is the guardian of its Indian ward is no reason, by itself, why a state should be precluded from taxing the estate of the Indian. We have held that the Indians, like all other citizens, must pay federal income taxes. *Superintendent v. Commissioner, supra*, 421. "Wardship with limited power over his property" did not there "without more render [the Indian] immune from the common burden." A federal court has held, in a well reasoned decision defended before us by the Solicitor General of the United States, who is not a party to this action, that an Indian's estate is subject to the federal estate tax. *Landman v. Commissioner*, 123 F. 2d 787.<sup>12</sup> Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes.

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<sup>11</sup> See, for examples, Act of July 1, 1898, 30 Stat. 567, tract made "inalienable and nontaxable;" Act of March 1, 1901, 31 Stat. 861, tract made "nontaxable and inalienable;" Act of June 30, 1902, 32 Stat. 500, tract to remain "nontaxable, inalienable, and free from any incumbrance;" Act of April 26, 1906, 34 Stat. 137, "all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation." Cf. for special treatment of the Quapaw Indians the Act of April 17, 1937, 50 Stat. 68.

<sup>12</sup> Cert. den., 315 U. S. 810. The Department of the Interior in the *Landman* case made substantially the same argument it makes here against taxation of Indians' estates. It emphasizes that the decision of the Circuit Court of Ap-

Congress has passed laws under which Indians have become full fledged citizens of the State of Oklahoma.<sup>12</sup> Oklahoma supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society. Citizens of Oklahoma must pay for these benefits. If some pay less, others must pay more. Since Oklahoma has become a state, it has been authoritatively stated that tax losses resulting from tax immunity of Indians have totaled more than \$125,000,000, a sum only slightly less than the bonded indebtedness of the state.<sup>13</sup> If Congress intended to relieve these Indians from the burden of a state inheritance tax as a consequence of our national policy toward Indians, there is still no reason why we should imply that it intended the burden to be borne so heavily by one state. But there is a complete absence of any evidence of congressional belief that these exemptions are required on equitable grounds, no matter on which sovereign the burden falls. Here is a tax based solely

peals would lead to similar taxation by states. The Solicitor General, opposing the Department of the Interior in the *Landman* case, insisted that under *Superintendent v. Commissioner*, 295 U. S. 418, and *Choteau v. Burnet*, 283 U. S. 691, the Indians' estates should be subjected to taxation; and that even if the Indians' lands were exempt from direct taxation, the estate tax should be upheld as an excise tax, indirect in its nature, citing *United States Trust Co. v. Helvering*, 307 U. S. 57; *Plummer v. Coler*, 178 U. S. 115; *Greiner v. Lewellyn*, 258 U. S. 384. In other words, the Solicitor General in seeking to uphold the validity of a federal estate tax as applied to Indian estates opposed the argument which the Department of the Interior made then and which it makes now, the only difference being that in the instant case the Department of the Interior is seeking to invalidate a state instead of a federal tax.

<sup>12</sup> It must not be assumed that the Oklahoma Indians are all unable to pay estate taxes. The estates of the three Indians here involved, as has been noted, total well over \$1,200,000. Oil and gas receipts of the Five Civilized Tribes from 1904 to 1937 were in excess of one hundred million dollars. Hearing on S. Res. 168, Senate Committee on Indian Affairs, 75th Cong., 3rd Sess., p. 36. The Osages in the same period received \$261,000,000. p. 34. Annual per capita income for the Osage Tribe as shown by a careful study made in 1928 was \$19,119. *The Problem of Indian Administration*, Institute for Government Research, Lewis Meriam, Director, chapter 10, General Economic Conditions, 430, 450. 2,826 Osage Indians are reported to own tribal and individual property valued at \$31,968,000. p. 443. The economic status of the Osages is discussed in *McCurdy v. United States*, 246 U. S. 263, 265.

For a discussion of the respected position of Indians in Oklahoma, see the dissenting opinion of Judge Williams, Board of County Commissioners v. Seber, 130 F. 2d 663, 681-683. The 1933 Act discussed above was sponsored in the House of Representatives by Congressman Hastings of Oklahoma, who was himself of Indian descent.

<sup>13</sup> Hearings before the Senate Committee on Indian Affairs, note 13, *supra*, p. 4.

on ability to pay.<sup>15</sup> "Only the same duties are exacted as from our own citizens. The burden must rest somewhere. Revenue is indispensable to meet the public necessities. Is it unreasonable that this small portion of it shall rest upon these Indians?" *The Cherokee Tobacco*, *supra*, p. 621.

Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. *Graves v. N. Y. ex rel. O'Keefe*, 306 U. S. 466 permitted States to impose income taxes upon government employees and *Helvering v. Gerhardt*, 304 U. S. 405, permitted the federal government to impose taxes on state employees. *O'Malley v. Woodruff*, 307 U. S. 277, overruled a previous decision which held that judges should not pay taxes just as other citizens, and *Helvering v. Mountain Producers Oil Corp.*, *supra*, repudiated former decisions seriously limiting state and federal power to tax. See also *Metcalf v. Mitchell*, 269 U. S. 514, and *James v. Dravo Contracting Co.*, 302 U. S. 134. The trend of these cases should not now be reversed.

What has been said requires the conclusion that the cash and securities are not exempted by any existing legislation from state estate taxation, and this is likewise true of the personal property in two of these estates.

The validity of the taxes on the transfer of the land presents a somewhat different problem. Some of these lands are exempt from direct taxation by virtue of explicit congressional command. The Act of May 10, 1928, 45 Stat. 493, for example, provides that Indians of a class which includes the three deceased should select up to 160 acres of his allotted, inherited or devised restricted lands, which "shall remain exempt from taxation while the title remains in the Indian designated . . . or in any full-blood Indian heir or devisee", while all other restricted lands are made subject to taxation by Oklahoma. The state argues that congressional exemption of the land from direct state taxation does not exempt the land from an estate tax, because of the principles announced in *United States Trust Co. v. Helvering*, *supra*. A majority of the Court concludes that this principle does not apply to

<sup>15</sup> "The view of the survey staff is that the Indians must be educated to pay taxes just as they must be educated to do other things. The taxes imposed upon them must always be properly related to their capacity to pay. For them an income tax would be infinitely better than a general property tax because of its direct relationship to their capacity to pay. The returns from such a tax would obviously be extremely small at the outset, but they would increase with the increasing productivity of the Indians." *The Problem of Indian Administration*, note 13, *supra*, 478; and see also 43, 98.



Indian lands specifically exempted from direct taxation. We therefore hold that the transfer of those lands which Congress has exempted from direct taxation by the state are also exempted from estate taxes.

To summarize:

In No. 623, the transfer of the cash and securities is taxable, the transfer of the homestead and other allotted land, exempted under the Act of May 10, 1928, is not. The 43 acres purchased for the intestate from her restricted funds was taxable at the time of her death, *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U. S. 475, and hence is subject to the estate tax.

In No. 624, the transfer of the cash and securities and the personal property is taxable. The deceased died before the Act of May 10, 1928, took effect, but her 240-acre holding was specifically exempt from direct taxation at the time of her death under § 19 of the Act of April 26, 1906, and the transfer of lands is therefore not taxable.

In No. 625, the same result as in No. 623 follows for the restricted lands which were appropriately selected for exemption under the Act of May 10, 1928, and for the personal property, cash, and securities. The judgment and the insurance policy are to be treated as in a class with the personal property, cash, and securities. It is conceded that the 160 acres of inherited property held by the deceased was taxable at the time of his death because in excess of the exemption permitted by the 1928 Act, and this land is, therefore, subject to the estate tax. While the status of the deceased 4/5's interest in a 40-acre tract is not clear from the record, no showing has been made that it is not taxable.

The government is entitled to recovery of the estate tax paid on the transfer of lands exempt from direct taxation, and to no more. The judgment below is vacated and the cause is remanded to the district court for further proceedings consistent with this opinion.

*It is so ordered.*

Mr. Justice DOUGLAS.

I concur in the result and in the disposition of the case. While I agree that transfers of the restricted Indian lands are not subject to Oklahoma's estate tax, I take the contrary view as respects the funds and securities covered by the Act of January 27, 1933, 44 Stat. 777. In my opinion transfers of those funds and securities are subject to the tax for the two reasons set forth in the opinion of the Court.



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[June 14, 1943.]

Mr. Justice MURPHY, dissenting in part.

I dissent because the opinion of the Court rejects a century and a half of history. We are not here dealing with mere property or income that is tax exempt. This is not the ordinary case of government and its citizens, or a group of citizens who seek to avoid their obligations. Our concern here is entirely different. It is with a people who are our wards and towards whom Congress has fashioned a policy of protection due to obligations well known to all of us. It rests with Congress to choose when we are done with that trusteeship. Meanwhile it is our obligation to interpret in the light of the history of that relationship all legislation which Congress has enacted to carry out its Indian policy. Normally it is true that strong considerations of fiscal and social policy view tax exemptions with a hostile eye. Such exemptions are not to be lightly implied, and every reasonable implication in construing legislation is to be made against their grant. But this general doctrine against tax exemption is irrelevant in considering the taxing power of a state in relation to Indians. For as to them a totally different principle comes into

operation, namely, the special status of Indians during the whole course of our constitutional and legal history. There can be no doubt of Congress' plenary power to exempt Indians and their property from all forms of state taxation. Such power exists to prevent impairment of the manner in, or means by which Congress effectuates its Indian policy, at least so long as Congress has not determined that the interests of the Indians require their complete release from tutelage or the final termination of the United States' guardianship over them. *Board of Commissioners v. Seber*, — U. S. —, No. 556 this Term; cf. *Tiger v. Western Investment Co.*, 221 U. S. 286, 315-16; *Brader v. James*, 246 U. S. 88, 96; *United States v. McGowan*, 302 U. S. 535, 538. See *United States v. Sandoval*, 231 U. S. 28, 45-47. To deny such constitutional power is to deny the presupposition of all legislation relating to Indians as well as an unbroken line of decisions on Indian law in this Court and all that underlies them. This course of legislation and adjudication may be fairly summarized as recognizing the special relation of Indians toward the United States and the exclusion of state power with relation to them, except in so far as the federal government has actually released to the state governments its constitutional supremacy over this special field. Therefore, so far as the power of state to tax Indian property is concerned, the ordinary rule of tax exemption is reversed; a state must make an affirmative showing of a grant by Congress of the withdrawal of the immunity of Indian property from state taxation. This is so because it is Indian property and because Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate such an immunity and allow states to treat Indians as part of the general community.

Congress has manifested no such purpose with regard to the estates of the deceased Indians before us. On the contrary, those Indians were subject to federal control.<sup>1</sup> Most of their allotted

<sup>1</sup> The deceased Indians in these three cases were enrolled full-blood Indians of the Five Civilized Tribes. Two were Seminoles and one was a Creek. Congress has not terminated the guardianship relation with respect to these tribes. They still exist (§ 28 of Act of April 26, 1906, 34 Stat. 137), and have recently been authorized to resume some of their former powers (Act of June 26, 1936, 49 Stat. 1967). Congress has regarded their members of the half Indian blood or more, whether enrolled or not, as restricted tribal Indians subject to federal control. The fact that these Indians are citizens is not inconsistent with their restricted status or the exercise of federal supervision over them. See *Board of Commissioners v. Seber*, *supra*; *Glenn v. Lewis*, 105 F. 2d 398.

lands were expressly exempt from taxation, and, as the opinion of the Court recognizes, this removed them from the operation of Oklahoma's estate tax.<sup>2</sup> But apart from these express exemptions, the bulk of the properties in the three estates were restricted against alienation and encumbrance by various acts of Congress.<sup>3</sup> History, as well as statements of Congress itself,<sup>4</sup> leave no doubt that property so restricted is beyond the taxing power of the states, unless and until Congress gives its consent. In other words restriction is tantamount to immunity from state taxation. That was the basis of decision in *Choctaw & Gulf R. R. v. Harrison*, 235 U. S. 292; *Indian Oil Co. v. Oklahoma*, 246 U. S. 522; *Jay Bird Mining Co. v. Weir*, 271 U. S. 609; *Howard v. Gipsy Oil Co.*, 247 U. S. 503; *Large Oil Co. v. Howard*, 248 U. S. 549; *Gillespie v. Oklahoma*, 257 U. S. 501. In all those cases a non-Indian lessee of restricted Indian lands was held immune from state taxation of various kinds because, and only because, the lands themselves and the leasing of them were held to be immune from taxation, and this in turn because they were the lands of Indians held in Government tutelage, who were permitted to lease the lands only with the approval of the Secretary of the Interior. This immunity for lessees was withdrawn by *Helvering v. Producers Corp.*, 303 U. S. 376, which overruled *Gillespie v. Oklahoma*, *supra*. Cf. the dissenting opinions in *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393. In neither the *Coronado* case nor in the *Producers* case was there any contention that the land in the hands of the lessors was subject to taxation. That was recognized and accepted as correct. The point was that even though the land was tax immune in the hands of the lessor, the lessor's immunity did not extend to the lessee who had no personal immunity and who acquired the land for his own purposes and made a profit from it. In other words, the

<sup>2</sup> See Act of July 1, 1898, 30 Stat. 567; Act of March 1, 1901, 31 Stat. 861; Act of June 30, 1902, 32 Stat. 500; § 19 of Act of April 26, 1906, 34 Stat. 137; § 4 of Act of May 10, 1928, 45 Stat. 495 and 733.

The fact that the exemptions do not mention inheritance or estate taxes is unimportant. As pointed out before, contrary to the general rule Indian tax exemptions are to be liberally construed. See *Carpenter v. Shaw*, 280 U. S. 363, 366-67. For that reason decisions, such as *U. S. Trust Co. v. Helvering*, 307 U. S. 57, that statutory exemptions from taxation do not include an exemption from estate taxes, have no application here.

<sup>3</sup> In addition to the statutes cited in Note 2, *supra*, see also Act of May 27, 1908, 35 Stat. 312; and Act of January 27, 1933, 47 Stat. 477.

<sup>4</sup> See Note 12, *infra*.

withdrawal of immunity from a non-Indian lessee of restricted Indian land rests upon the remoteness of the effect of that taxation upon such Indian property, cf. *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, not upon a notion that Congress did not intend by imposing restrictions to prohibit state taxation of the interest of Indians in their restricted property, nor upon the supposition that Congress lacks power to do so. Congress plainly has power to implement its Indian policy by forbidding state taxation to burden the interest of an Indian in his property. Cf. *Shaw v. Oil Corp'n*, 276 U. S. 575; *Board of Commissioners v. Seber*, — U. S. —, No. 556 this Term. It exercises that power simply by imposing the restrictions.

That Congress has considered the restriction of Indian property against alienation and encumbrance as carrying with it immunity from state taxation for the period of the restriction is clear not only from statements of Congress itself to that effect,<sup>5</sup> but also from the long history of such restrictions and the purpose sought to be achieved, the protection of a dependent people from their own improvidence and the exploitation of others.

Congress early established the complete and exclusive control of the Federal Government over the purchase and disposition of Indian lands, both tribal and individual.<sup>6</sup> The protection afforded by those and subsequent restrictive acts and treaties extended to trespasses, transfers, tax sales, tax liens, and other attempted interferences by the state governments with federal control over Indian lands. See *Worcester v. Georgia*, 6 Pet. 515; *The Kansas Indians*, 5 Wall. 737; *The New York Indians*, 5 Wall. 761.

The United States was unable, however, to prevent state interference with the Creeks and the Seminoles in their domains east of the Mississippi, and accordingly proposed removal west of the Mississippi, guaranteeing that there no State or Territory should "ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves, so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them." Article XIV, Treaty of March 24, 1832 (7 Stat. 366). Long after the removal this guarantee was reaffirmed. Article IV, Treaty of August 7, 1856 (11 Stat. 699). Nothing in the subsequent treaties and

<sup>5</sup> See Note 12, *infra*.

<sup>6</sup> Indian Trade and Intercourse Acts of July 22, 1790, 1 Stat. 137; March 1, 1793, 1 Stat. 329; March 3, 1799, § 12, 1 Stat. 743, 25 U. S. C. § 177.

allotment acts relating specifically to the Creeks and the Seminoles was inconsistent with this guarantee of freedom from state control.<sup>7</sup> And Congress was careful to provide that nothing in the creation of the State of Oklahoma should qualify this promise. Thus the Oklahoma Enabling Act (34 Stat. 267) provided that the Oklahoma Constitution should not "limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed." The constitution adopted by the people of Oklahoma renounced any claims to Indian lands (Art. 1, § 3), and exempted from taxation "such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States Government, or by Federal laws during the force and effect of such treaties or Federal laws" (Art. X, § 6). See *Tiger v. Western Investment Co.*, 221 U. S. 286, 309; *Ex parte Webb*, 225 U. S. 663, 682-83; *Ward v. Love County*, 253 U. S. 17; *Carpenter v. Shaw*, 280 U. S. 363, 366.

As we recently said in *Board of Commissioners v. Seber*, *supra*, Congress in 1887 turned from a policy of protecting Indian tribes in the possession of their domains to a program, now discontinued, of assimilating the Indians through dissolution of their tribal governments and the compulsory individualization of their lands. This allotment program evolved out of the historical background sketched above, and took its cue from the previous protection and freedom from state control accorded Indians and their lands. The Indian surrendered tribal land, protected against state taxation as well as against all other forms of voluntary and involuntary encumbrance and alienation. Cf. *The Kansas Indians*, *supra*; *The New York Indians*, *supra*. Under the various allotment acts he received in return land which was intended to have the same measure of protection for a temporary period, generally subject to extension. Thus the General Allotment Act of 1887 (24 Stat. 388) provided for the issuance to allottees of trust patents which were to declare: "the United States does . . . hold the land thus allotted, for the period of twenty-five years, in trust

<sup>7</sup> See Treaty of March 21, 1866, 14 Stat. 755; Treaty of June 14, 1866, 14 Stat. 785; Curtis Act of 1898, 30 Stat. 495; Act of July 1, 1898, 30 Stat. 567; Act of March 1, 1901, 31 Stat. 861; Act of June 30, 1902, 32 Stat. 500.



v. Trapp, 224 U. S. 665, 673, but this of course does not mean that the concepts of restriction and immunity from state taxation are unrelated. Nor does the circumstance that some of the applicable statutes expressly provide specific tax exemptions for restricted lands indicate that restriction is not tantamount to immunity from state taxation.<sup>14</sup> At the time the allotments to the members of the Five Civilized Tribes were made there was no State of Oklahoma. It had been held that Congress had power to lay taxes upon Indian property within Indian Territory, *The Cherokee Tobacco*, 11 Wall. 616, and its creature, the Territorial government, was agitating for the taxation of Indian property.<sup>15</sup> Restrictions, designed to protect the Indians from themselves and the actions of third parties, including state governments, did not bar taxation by the federal government which was the guardian of their interests.<sup>16</sup> Accordingly, specific tax exemptions were written into the allotment acts.<sup>17</sup> Express provisions as to the taxable status of restricted property in the later legislation appear only where the immunity is being limited and expressly waived in part, or the restrictions are being changed.<sup>18</sup>

All of the lands which the opinion of the Court holds immune from Oklahoma's estate tax because of express exemptions were therefore also exempt at the moment of death on the additional ground that they were then subject to restrictions imposed by Congress and the concomitant tax immunity had not been waived. The other restricted lands in the estates are lands to whose taxation Congress has specifically consented, or else were of the type to be taxable at the time of death under the decision in *Shaw v. Oil Corp'n*, 276 U. S. 575.

The origin of restrictions upon the fund of members of the Five Civilized Tribes is somewhat different from that upon the lands, but the effect of the restrictions upon the taxability of the cash and securities in the three estates with which we are

<sup>14</sup> Act of July 1, 1898, 30 Stat. 567; Act of March 1, 1901, 31 Stat. 861; Act of June 30, 1902, 32 Stat. 500; § 19 of Act of April 26, 1906, 34 Stat. 137; § 4 of the Act of May 10, 1928, 45 Stat. 495 and 733.

<sup>15</sup> See Sen. Doc. 169, 58th Cong., 2d Sess.

<sup>16</sup> It is for this historical reason that cases such as *Superintendent v. Commissioner*, 295 U. S. 418, and *Landman v. Commissioner of Internal Revenue*, 123 F. 2d 747, have no bearing upon a consideration of the effect of restrictions upon the power of a state to tax.

<sup>17</sup> See Act of July 1, 1898, 30 Stat. 567; Act of March 1, 1901, 31 Stat. 861; Act of June 30, 1902, 32 Stat. 500.

<sup>18</sup> Act of April 26, 1906, 34 Stat. 137; Act of May 10, 1928, 45 Stat. 495.



dealing is the same. Proceeds from sales or leases of restricted lands have always been regarded as "trust" or "restricted" funds by the Secretary of the Interior, who by regulations has required them to be paid to him or his representatives and held for the benefit of the Indian owner.<sup>19</sup> The validity of those administrative restrictions and the power of the United States to enforce them have been recognized. *Parker v. Richard*, 250 U. S. 235; *Mott v. United States*, 283 U. S. 747. And it has been held that funds so restricted by departmental regulation are exempt from state and local taxation. See *United States v. Thurston County*, 143 Fed. 287; *United States v. Hughes*, 6 F. Supp. 972. But we do not have to consider whether this administrative restriction alone is sufficient to confer tax exemption upon the cash and securities in the three estates.<sup>20</sup>

The Act of January 27, 1933 (47 Stat. 777), imposes Congressional restrictions by providing:

"That all funds now held or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled, are hereby restricted and shall remain subject to the jurisdiction of said Secretary until April 26, 1956, . . ."

This Act does not stand alone. It is part of Congress' long continued program of protection and it carries with it the gloss of the history of the restrictions outlined above. Congress was not imposing restrictions for the first time, and there is nothing to suggest that Congress intended them to have less than their traditional historical meaning of tax exemption in this Act. It is immaterial that the legislative history of the Act is silent with regard to the tax status of Indian funds. We are dealing not with a word, nor with an act, but with a course of history. That

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<sup>19</sup> Since 1908 the regulations prescribed by the Secretary under § 2 of the Act of 1908, 35 Stat. 312 and related statutes governing oil, gas and other mining leases of restricted lands, have recognized that proceeds from such leases are restricted and have required that all such money be paid to a representative of the Secretary. See 25 CFR §§ 183.18, 183.20; see also § 20 of the regulations approved April 20, 1908.

<sup>20</sup> In *Shaw v. Oil Corp.*, 276 U. S. 575, the interest of an oil lessee in land purchased for an Indian by the Secretary of the Interior with the Indian's restricted funds and conveyed to the Indian by a restricted form of deed pursuant to conditions imposed by the Secretary, was held subject to an Oklahoma oil production tax. The opinion emphasized the difference between "a mere conveyancer's restriction" and action by Congress.

course makes it clear that the restricted funds in these estates were beyond the taxing power of Oklahoma.<sup>21</sup>

It is not our function to speculate whether it is wise at this late day to relieve from the ordinary burden of taxation Indians who enjoy the privileges of citizenship and who in some instances are persons of substantial means. Nor is it our legitimate concern that grants of tax exemption to Indian inhabitants may create serious fiscal problems in some states or in their local governmental subdivisions. Those matters, as well as the character, extent and duration of tax exemptions for the Indians, are questions of policy for the consideration of Congress, not the courts. *Board of Commissioners v. Seber, supra.* Our inquiry is not with what Congress might or should have done, but with what it has done. That inquiry can be answered here only by holding that the restricted funds in these estates, as well as the lands which the Court holds immune, were not subject to Oklahoma's estate tax.

The CHIEF JUSTICE, Mr. Justice REED and Mr. Justice FRANKFURTER join in this dissent.

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<sup>21</sup> Two of the decedents died before the Act was passed. The House Committee report, however, makes it clear that the restriction on funds was intended to be declaratory and retroactive. H. Rep. No. 1015, 72d Cong., 1st Sess. In view of this there is no reason why the restricted funds in the estates of those decedents, held by the Secretary, should not be deemed covered by that Act, and hence tax exempt by virtue of the restrictions.